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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 681

THE MIAMI HERALD PUBLISHING CO., a Florida corporation, *Petitioner*,

v.

DOROTHY M. BRANTIGAM, as Administratrix of the Estate of George A. Brantigam, Deceased, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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THE MIAMI HERALD PUBLISHING CO., a Florida corporation, *Petitioner*,

v.

DOROTHY M. BRAUTIGAM, as Administratrix of the Estate of George A. Brautigam, Deceased, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

To The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Miami Herald Publishing Company, a Florida corporation, respectfully prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, entered on March 9, 1961, affirming a final judgment entered on a jury verdict on February 17, 1958, by the Circuit Court for Dade County, Florida, in an action for libel against the Petitioner in the sum of $25,000.00 com-

pensatory damages and $75,000.00 punitive damages (R. 100, 857, 902-930).[1]

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, dated March 9, 1961 is reported at 127 So. 2d 718 and is reprinted in the Appendix to this Petition, *infra* (App. 5a-35a; R. 902-930).

The opinion of the Supreme Court of Florida entered in respect of a jurisdictional question on June 15, 1960, in which that Court transferred this case to the District Court of Appeal of Florida, Third District, for a decision on the merits, is reported at 121 So. 2d 431 and is reprinted in the Appendix to this Petition (App. 2a-5a; R.-S. Ct. 2-5).

The opinion of the District Court of Appeal of Florida, Third District, entered in respect of its jurisdiction on November 24, 1958, in which the District Court of Appeal ordered the transfer of all papers in this case to the Supreme Court of Florida is unreported but is reprinted in the Appendix to this Petition (App. 1a; R. 881).

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[1] On October 2, 1961 the Supreme Court of Florida entered an Order, without opinion, denying a Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District, which had been timely filed by Petitioner herein. This Petitioner has found no decision in which the Supreme Court of Florida has decided whether an order entered by that Court denying a petition for a writ of certiorari operates as an affirmance of the judgment sought to be reviewed. Accordingly, both the record in the District Court of Appeal of Florida, Third District, and the record in the Supreme Court of Florida have been filed in this Court. Citations to the record in the District Court of Appeal of Florida, Third District, are as follows: "R. ——". Citations to the record in the Supreme Court of Florida will appear as follows: "R.-S. Ct. ——".

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).[2]

QUESTIONS PRESENTED

(1) Is the right of a newspaper publisher to comment fairly upon and to criticize the conduct of a public official in newspaper editorials constitutionally protected free speech guaranteed by the First and Fourteenth Amendments to the Constitution of the United States?

(2) In an action for libel instituted by a public official and based upon newspaper editorials commenting upon and criticizing the conduct of the official, is the publisher of such newspaper editorials effectively deprived of its defense of fair comment and, therefore, deprived of its right of free speech and press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States where

(a) the trial court permitted the introduction into evidence of an opinion of the Supreme Court of Florida, entered in a separate case to which the publisher was not a party and announced some ten months following the publication of the alleged libel, approving the public official's conduct;

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[2] On March 9, 1961 the District Court of Appeal of Florida, Third District, entered the judgment subject of this Petition for a Writ of Certiorari, and on March 23, 1961 denied a Petition for Rehearing. By order entered October 2, 1961 the Supreme Court of Florida denied a Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District, and on October 30, 1961 entered an order denying the Petition for Rehearing filed by the Petitioner at bar.

(b) the trial court by its instruction to the jury imposed absolute liability upon a finding by the jury that the editorials were not free from the imputation of dishonorable or corrupt motives, without further charging the jury as to the right to make such imputation when reasonably inferred from the facts truly stated; and

(c) the trial court failed to grant the publisher's Motion For Judgment in Accordance With Motion for Directed Verdict or for New Trial, notwithstanding the establishment of the defense of fair comment as a matter of constitutionally protected free speech?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 13 of the Declaration of Rights, Constitution of Florida, provides:

> "Every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions and civil actions for libel, the truth may be given in evidence to the jury and if it shall appear that the matter charged as libellous is true, and was published for good motives, the parties shall be acquitted or exonerated."

STATEMENT OF THE CASE

The Parties

Petitioner, the Miami Herald Publishing Co., a Florida corporation, is the publisher of the Miami Herald, a daily newspaper of large circulation which is published at Miami, Florida, and was the defendant in the trial court (R. 66).

Respondent, Dorothy M. Brautigam, is the Administratrix of the Estate of George A. Brautigam, Deceased, who was her late husband and the plaintiff in the trial court (R. 870-874). For convenience, references herein to "Respondent" will refer to George A. Brautigam, deceased, and references to exhibits introduced during trial by Petitioner and Respondent will be cited "Defendant's Exhibit ——", and "Plaintiff's Exhibit ——", respectively.

Background of Controversy

This action for libel had its genesis in the publication of two newspaper editorials by the Petitioner in the Miami Herald on April 28 and April 30, 1956, criticizing the Respondent's attempt to suppress an Interim Report of the 1955 Fall Term Dade County Grand Jury (Plaintiff's Exhibits 3 and 5).

It is a matter of public knowledge, of which this Court may take judicial notice, that the administration of justice in Dade County long has been a matter of great and widespread interest.[3] This has been particularly true of the organization and work of grand juries over a period of more than a decade. In order to strengthen the grand jury system, the Grand Jury Association of Dade County, the Crime Commis-

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[3] Likewise, it has been true in respect of the conduct of judicial proceedings by individual members of the Dade County Circuit Court and the bitter controversies between judges on that bench, which they have not hesitated to air publicly.

See "The Dowling Case" submitted by Judge Vincent C. Giblin to the public under date of April 15, 1957, consisting of the transcript of an interview of Judge Giblin by Alan Courtney, radio commentator, broadcast by Station WQAM, Miami, Florida, April 11-12, 1957. Also, see "Here are the Facts" submitted by Judge George E. Holt to the public, consisting, *inter alia*, of a copy of the Florida Supreme Court's opinion in the case of *State of Florida, ex rel. George A. Brautigam, State Attorney, Eleventh Judicial Circuit of Florida, Appellant v. Interim Report of Grand Jury Recommending Resignation of Judges and Disbarment of Attorneys Implicated in the Dowling Estate Curators Case, Dated April 26, A.D. 1956 of the Dade County Grand Jury, Fall Term, 1955, Appellee*, 93 So. 2d 99 (1957); and also, reprints of seven articles entitled "The Story of our Grand Jury," published by the Miami Daily News, March 11, 12, 13, 14, 15, 16 and 17, 1957.

sion, and others procured the enactment of many laws especially applicable in Dade County.[4]

The Supreme Court of Florida prior to the publications here in controversy had never intimated that a grand jury was prohibited from recommending remedial action short of indictment, although on a number of occasions that court had considered cases in which grand juries had made critical reports unaccompanied by indictments.[5]

The Dade County Grand Jury Report and Respondent's Motion to Suppress It

During the Spring of 1956, it was a "poorly kept secret" and "common gossip" that the 1955 Fall Term Dade County Grand Jury was investigating the conduct of certain Circuit Judges and certain members of the Bar and was preparing a report thereupon (R. 330, 490, 528, 543). A special Assistant to the State

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[4] Some of these were: Chapter 25554, General Laws of 1949, the Twenty three Member Grand Jury Law; Chapter 26518, Laws of 1951, sometimes known as "The Blue Ribbon Grand Jury Law", providing for registration for voluntary service; Chapter 26519, Acts of 1951, empowering the Grand Jury to issue its own witness subpoenas and subpoenas duces tecum; Chapter 26865, Acts of 1951, the Continuous Grand Jury Law; Chapter 25765, Acts of 1949, providing a fund for the employment of special legal counsel and investigators; Chapter 28467, Laws of 1953, providing for a permanent administrative assistant to the Grand Jury; Chapter 28468, Laws of 1953, providing that the Grand Jury shall be the official custodian of its own records; and Chapter 28469, Laws of 1953, providing that the Grand Jury may exclude from its sessions any member who violates his oath or attempts to obstruct the Grand Jury.

In addition, there were other enactments such as Amendments to Chapter 905, Florida Stat. Ann., which is the law of general application throughout Florida pertaining to grand juries.

[5] See footnote 15, *infra*.

Attorney had been appointed to advise and assist the Grand Jury in the preparation of its Report (R. 197, *et seq.*).

On April 26, 1956 the Grand Jury presented its Interim Report to Robert L. Floyd, a Circuit Judge of Dade County (R. 11-35, 203; Defendant's Exhibit 1).

In an unprecedented action, Respondent, then State Attorney, moved that court, *ore tenus*, to withhold the filing and publication of the Interim Report so as to prevent its being spread upon the public record (R. 204-206). Respondent's oral motion was granted and an oral rule to show cause why the Interim Report should be expunged was set for hearing on April 30, 1956 at two p.m. (R. 206). On April 27, in chambers, Respondent filed his "Response to Oral Rule to Show Cause Why the Interim Report of the Grand Jury, Fall Term, 1955, Should be Expunged, Etc.", (R. 208, 216, Plaintiff's Exhibit 1), in which he moved to suppress all of the Interim Report, except for part of the first page and the last paragraph thereof. For the first time Respondent made public his contention that the Interim Report, if published, would tend to disrupt the administration of justice and would adversely affect the confidence of the people in the judicial system (Plaintiff's Exhibit 1, Paragraph 4).

Following a public hearing on the State Attorney's Response (motion to suppress) which was held on April 30 in a courtroom overflowing with spectators and representatives of television, radio and newspapers (R. 298-299), the trial court received the Report and ordered that it be released to the public.

Thereupon the Interim Report was given the widest publicity in the press and on radio and television. Petitioner and another newspaper, the Miami Daily News, published the Report in full (R. 230-231, 301-302).

Petitioner's Editorials and Other Criticism of Respondent in Respect of the Motion to Suppress

The State Attorney's unprecedented action was given widespread publicity by all the local media of news dissemination and was widely discussed by members of the general public (R. 522-523; 535).

The Miami Daily News, on April 27, 1956, carried on its front page a banner headline reading "2 Officials Seen as Targets of Report as Irate Jury Huddles on Court Curb". A Circuit Judge was quoted as stating that he had given testimony before the Jury and expressing the opinion that the Grand Jury had the authority to investigate "even the Circuit Court or a circuit judge or any other judge". It was further reported that the judge in question "declined further comment as to whether a fellow circuit judge is involved". The same edition contained a strong editorial condemning the State Attorney's efforts to suppress the Interim Report even if the Report might be "ill-advised, intemperate or even improper", taking the position that the Report was the "people's affair", that it was "the right of the people to know what that report contains and to know it without delay", and describing the Grand Jury as "the people's instrument" (Defendant's Exhibit D; R. 282, 287-288).

The matter attained such widespread publicity that two gubernatorial candidates were quoted in the Miami

Daily News on Saturday, April 28th, as demanding the Respondent's removal by Governor Collins (Defendant's Exhibit F; R. 282-283).

It was against this background that Petitioner on Saturday, April 28, 1956, published the first of the two editorials.[6]

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[6] "People Have The Right To Know

"WHY DOES STATE ATTORNEY MUZZLE THE GRAND JURY?

"THE ACTION of George A. Brautigam, state attorney, in throwing a road block in front of a hard-working conscientious Grand Jury, raises two immediate questions:

"'Is he afraid of something, or of someone?'

"'Is he trying to protect someone?'

"Neither may be the reason, but the State Attorney has invited both questions.

* * *

"THE GRAND JURY is the people's agency of investigation.

"It supplements the work of the State Attorney, who is the people's prosecutor in important cases.

"His office, however, is not above the Grand Jury's attention.

"When the State Attorney and the Grand Jury are in conflict, as in this instance, the people's rights are in jeopardy.

"In asking Judge Robert L. Floyd of Circuit Court to withhold the jury's report, Brautigam is off the track of his public responsibility. We think the judge should have told him so instead of granting his request.

* * *

"As long as Brautigam stands in the untenable position of asking the Court to keep the jury's findings from the people he invites suspicion.

"He can remove it only by reversing his course: By making available to the people, who have the right to know, what the Grand Jury has uncovered.

"As it stands, Brautigam, the man the people elected to represent them, has run out on them.

"Who will speak for the people in Judge Floyd's court Monday?" (Plaintiff's Exhibit 3)

On Monday, April 30, 1956, Petitioner published a second editorial.[7]

Following publication of the first editorial Respondent requested that Petitioner publish his side of the controversy and was told by Petitioner's representative that this would be done. In fact, Petitioner offered the assistance of one of its reporters so that Respondent might prepare a statement in Petitioner's

[7] "Who Will Represent the Public?

"STATE ATTORNEY BRAUTIGAM
RUNS OUT ON THE PEOPLE

"This Afternoon at 2 o'clock, the people's right to know what its own agency, the Grand Jury, is doing will be tested before Judge Robert L. Floyd in Circuit Court.

"Who will represent the people in this outlandish situation in which they have been blocked by court order from being told what their Grand Jury wants to tell them in the interest of law and order.

"State Attorney George Brautigam was permitted by Judge Floyd to withhold release of the jury's report until Brautigam had a chance to review the contents. It was highly unusual, if not unprecedented procedure.

"Brautigam is the people's lawyer through the office that he holds.

* * *

"Judge Floyd should take full cognizance of the fact that in seeking even a temporary suppression of the jury's report, Brautigam was not the servant of the people. He ran out on them.

"Judge Floyd should see to it that the people are ably and immediately represented if he feels that his judicial position prevents him from assuring the people in their right to know.

"The Dade County Grand Jury Association should get in touch with Gov. LeRoy Collins, point out that Brautigam turned his back on the people who employ him as well as on his job when he got the court to hold release of the jury's report, and demand his replacement.

"The people of this county will watch with concern and long memories how their rights are safeguarded by interested officialdom this afternoon." (Plaintiff's Exhibit 5)

offices. Respondent also was offered the alternative course of preparing his own statement which, had it been prepared, would have appeared in the morning edition of Petitioner's newspaper on April 29, 1956 (R. 226, 369, 371, 479, 488). Although no such statement was submitted by Respondent, the Petitioner, subsequently, on May 2 and May 3, published Respondent's motion to suppress in abridged form and published a news story giving Respondent's view of the matter (R. 317, 318, 373; Defendant's Exhibit K).

Proceedings in the Supreme Court of Florida in Respect of the Motion to Suppress the Grand Jury Report

The State of Florida, on the relation of Respondent, appealed to the Supreme Court of Florida from the order denying Respondent's motion to suppress the Interim Report. This appeal was a landmark case in Florida jurisprudence by reason of the fact previously noted that the Supreme Court of Florida had never intimated that a grand jury was prohibited from recommending remedial action short of an indictment.[8]

On February 27, 1957, approximately ten months after the publication of the editorials in question, the Supreme Court of Florida reversed the lower court's decision, releasing the Interim Report to the public, and ordered that the Report be expunged from the records of the Dade County Circuit Court (R. 232-233).[9] In its opinion the Supreme Court of Florida not only approved Respondent's conduct in seeking to suppress the Grand Jury Report but also highly praised him, saying at pages 103-4 of 93 So. 2d (App. 44a, *infra*):

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[8] See footnote 15, *infra*.

[9] *State ex rel. Brautigam* v. *Interim Report of Grand Jury*, Fla., 93 So. 2d 99 (1957).

"In bringing this phase of the matter to a close we feel impelled to commend Honorable George Braltigam, the State Attorney for the Eleventh Judicial Circuit at the time of the presentment in question, for promptly asserting and advocating the rights of the general public in the principles of personal rights and freedom discussed and pronounced herein. His intervention for such purpose was made in the face of great obstacles and during a tornado of adverse public feeling that was generated by the improper presentment complained of. *Unlike Pilate, he did not yield to what appeared at the moment to be the popular side of a controversy but performed his duty according to the dictates of his own conscience, as he had the right to do. Subsequent public events indicate he paid a high price for his devotion to duty. Such courageous public service is worthy of this commendation.*" (Emphasis supplied)

Proceedings Below in the Case at Bar

On March 21, 1957, Respondent filed his Complaint, containing two counts, for libel against the Petitioner in the Circuit Court of Dade County, Florida (R. 1-6). An Answer was filed (R. 7-10). Thereafter, there was a voluntary withdrawal of Count 1 (R. 36, 41), and Petitioner filed an amendment to the Answer to Count 2. Following the filing of an Amended Complaint, containing two counts,[10] Petitioner filed an Answer to Count 1 of the Amended Complaint (R. 8-10, 46-50, 63-64, 65, 66-67).

Respondent complained, *inter alia*, that Petitioner published two editorials in the Miami Herald on April 28 and 30, 1956, in which Petitioner criticized Respondent's actions as State Attorney in attempting to

[10] Although the Amended Complaint contained three counts in its proposed form, Respondent elected to abandon the filing of Count Three (R. 62).

suppress the Interim Report of the Dade County Grand Jury for the Fall Term, 1955. Respondent alleged that the editorials were libelous; were published for the purpose of ruining Respondent's reputation; were false and known to Petitioner to be untrue. As to each count, Respondent demanded compensatory damages in the sum of $500,000.00 and punitive damages in the same amount (R. 1-6, 46-50).

Petitioner denied the editorials were false or published maliciously. Petitioner asserted as a part of its Answer to Count Two, and incorporated by reference in its Answer to Count One of the Amended Complaint, a "Separate and Complete Defense" in which it was stated in part as follows (R. 7-10, 66-67):

> "That the matter complained of, insofar as it consists of allegations of fact (i.e., that the Plaintiff, then State Attorney, exerted every effort to suppress the Grand Jury's Interim Report and have both the report and its contents withheld from the public) is true in substance and fact, and, insofar as it consists of expressions of opinion, such opinions, as expressed, concerning the discharge of Plaintiff's duties as State Attorney, are fair comments, made in good faith, without malice, upon the said facts which are matters of grave public interest and concern, and said editorials were therefore privileged under the first amendment to the Constitution of the United States and Section 13 of the Declaration of Rights of the Florida Constitution."

During the course of the trial, which began on February 10, 1958, the trial court refused to permit the Petitioner to introduce the Interim Report into evidence, or to make reference to any matter under inquiry before the Dade County Grand Jury for the

Fall Term, 1955, on the ground that none of such matters were relevant (R. 68, 165, 173-174, 292). Despite that ruling, the trial court permitted Respondent's counsel, over objection of Petitioner, to refer to the opinion of the Supreme Court of Florida in *State ex rel. Brautigam, supra*, in his opening statement, to read the opinion in full to the jury, to read from the opinion in part during his argument to the jury, and to introduce the opinion into evidence (R. 138, 159-160, 165, 232-237, 292, 309, 743-747, 777; Plaintiff's Exhibit 6).

At every stage of the trial, Respondent and his counsel conceded there was no evil intent or personal animus on the part of Petitioner toward the Respondent. In fact, Respondent testified he knew of no "personal animosity", "ill-will", "hatred", or "ill-feeling" on the part of Petitioner or its employees (R. 164, 302-308, 362-363, 544, 751, 829). Respondent did not prove the falsity of a single fact set forth in the editorials.

On February 14, 1958, the jury returned a verdict against Petitioner in which it awarded Respondent $25,000.00 compensatory damages and $75,000.00 punitive damages. Final judgment on the verdict was entered February 17, 1958 (R. 100, 857).

In its Motion for Judgment in Accordance with Motion for Directed Verdict or for New Trial, Petitioner stated (R. 101-105):

> "2. The verdict is contrary to the First Amendment to the Constitution of the United States.
>
> "3. The verdict is contrary to Section 13 of the Declaration of Rights, of the Constitution of Florida.
>
> * * * *

"21. The Court erred in giving, over the defendant's objection, the following instruction to the jury:

"'If you find that the language in either or both editorials complained of is not free from the imputation of dishonorable or corrupt motives, then I charge you that the defendant has exceeded the bounds of fair comment and you should find for the plaintiff as to the defendant's liability arising from the publication of either or both of the editorials in question.'"

By Order entered April 29, 1958, Petitioner's Motion was denied (R. 106).

Thereafter, Petitioner perfected a timely appeal to the District Court of Appeal of Florida, Third District, and in paragraph 5, 6 and 8 of its Assignments of Error stated as follows (R. 858-859):

"5. The Court erred in denying the Defendant's Motion for a Directed Verdict in that such ruling deprived the Defendant of its right to make fair comment upon matters of public interest, in violation of the First and Fourteenth Amendments of the Constitution of the United States, and of Section 13 of the Declaration of Rights of the Constitution of Florida, and each of them.

"6. The Court erred in denying the Defendant's Motion for a New Trial in that such ruling deprived the Defendant of its right to make fair comment upon matters of public interest, in violation of the First and Fourteenth Amendments of the Constitution of the United States, and of Section 13 of the Declaration of Rights of the Constitution of Florida, and each of them.

* * * * *

"8. The Court erred in giving, over the Defendant's objections, the instructions to the jury set

forth in grounds 20, 21 and 26 of the Defendant's Motion for New Trial, and each of them."

On motion of Respondent, the District Court of Appeal, Third District, entered its order on November 24, 1958 transferring the case to the Supreme Court of Florida (R. 881), based upon a determination that "inherent in the judgment appealed from there was the construction of controlling provisions of the Florida and Federal Constitutions guaranteeing freedom of the press * * * and therefore that the judgment was appealable direct to the Supreme Court [of Florida] under Florida Appellate Rule 2. 1a (5) (a) * * *" (App. 1a, *infra*).

By order dated January 5, 1959, the Supreme Court of Florida, *sua sponte*, directed that the parties submit briefs on the question of its jurisdiction to hear and determine the appeal. Oral argument limited to the question of jurisdiction was held on March 16, 1959 pursuant to Court order (R. 887). No opinion was filed by the Supreme Court of Florida on the question of jurisdiction, and the parties filed briefs on the merits.

Thereafter, the Supreme Court of Florida again heard oral argument on December 9, 1959.

On June 15, 1960, the Supreme Court of Florida[1] held that it did not have jurisdiction to review this suit for libel on direct appeal since the trial court did not construe a controlling provision of the Florida or Federal Constitution. Noting that it had not reached or considered the merits of the case, that Court ordered

[1] 121 So. 2d 431.

the case transferred to the District Court of Appeal, Third District (R.-S. Ct. 2-5; App. 2a-5a, *infra*).

On March 9, 1961, following argument on the merits, the District Court of Appeal, Third District, entered its judgment and opinion on the merits, Judge Charles Carroll dissenting with opinion, in which it affirmed the judgment of the trial court (R. 902-930; App. 5a-35a, *infra*). Petitioner's Petition for Rehearing was denied on March 23, 1961, Judge Carroll again dissenting (R. 931-935; 936).

On May 22, 1961 Petitioner filed its Petition for Writ of Certiorari in the Supreme Court of Florida to review the judgment of the District Court of Appeal of Florida, Third District (R.-S. Ct. 6-56). By order entered without opinion on October 2, 1961, the Petition was denied (R.-S. Ct. 152; App. 35a, *infra*).

Petitioner timely filed its Petition for Rehearing which the Supreme Court of Florida denied in its order dated October 30, 1961 (R.-S. Ct. 153, 154; App. 36a, *infra*).

REASONS FOR GRANTING THE WRIT

Important and Unsettled Questions, Concerning the Extent to Which the Exercise of the Right of Every Citizen Fairly to Comment Upon and Criticize the Conduct of Public Officials Is Protected Under the Free Speech and Press Guaranties of the First and Fourteenth Amendments of the Constitution, Should be Settled by Pronouncement of this Court

This case involves two newspaper editorials which vigorously criticized the actions of Respondent, then a State Attorney of Dade County, Florida, in seeking to suppress a Grand Jury Report.

Petitioner asserts that such editorials were entitled to protection under the Free Speech and Press guar-

anties of the First and Fourteenth Amendments to the Constitution of the United States."

Insofar as Petitioner is able to determine, this Court has never decided the extent to which a citizen freely may comment upon and criticize the conduct of public men and measures although it has alluded generally to the subject.

In *Baumgartner* v. *United States*, 322 U.S. 665, at page 677 (1944), this Court refused to deprive a petitioner, with apparently pro-Nazi sentiments, of his citizenship "for the expression of silly or even sinister-sounding views which native-born citizens utter with impunity." Therein, the Court stated, at page 673 and 674 of its opinion:

> "One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation. * * *"

It is that right and its scope as a constitutionally protected exercise of free speech, that are here presented.

In *Near* v. *Minnesota*, 283 U.S. 697, at page 718 (1931), this Court noted James Madison's statement regarding the practice and sentiment which led to the liberty of the press guaranties contained in state constitutions (Report on the Virginia Resolutions, Madison's Works, vol. 4, 544), that

> "'In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of

the press has stood; on this footing it yet stands. * * *' "

Also see *Gandia* v. *Pettingill*, 222 U.S. 452 (1912).

While it is clear that states have power to provide legal sanctions for the utterance of a libel, it is equally clear that " 'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel." *Beauharnais* v. *Illinois*, 343 U.S. 250, 263-264 (1952).

In *Bridges* v. *California*, 314 U.S. 252, at page 262 (1941), this Court stated that the "clear and present danger" language of *Schenck* v. *United States*, 249 U.S. 47, "has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue." After referring to some of those cases, the Court said, at p. 263:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

The right of fair comment is meaningless unless this Court declares the extent to which such utterances are constitutionally privileged. In the absence of such a

determination, not even a moderate critic of government can be safe from a judgment inconsistent with the right of freedom of speech. For state court decisions on principles of substantive state law do not always give due consideration to the constitutional guaranties afforded by the First and Fourteenth Amendments. *Pennekamp* v. *Florida*, 156 Fla. 227, 22 So. 2d 875 (1945); reversed, 328 U.S. 331 (1946);

Highest courts of several states have recognized that the rights of free speech and fair comment mean the same thing. *Dicner* v. *Star-Chronicle Pub. Co.*, 230 Mo. 613, 132 S.W. 1143, 1149 (1910); also see *Griffin* v. *Opinion Pub. Co.*, 114 Mont. 502, 138 P. 2d 580 (1943). In *Julian* v. *American Business Consultants, Inc.*, 2 N.Y. 2d 1, 6-7; 155 N.Y.S. 2d 1, 10 (1956) the Court of Appeals of New York recognized that the right of fair comment is founded upon constitutional guaranties when it said:

> "To hold that this book in the light of the admissions made by the plaintiff, is defamatory, is to expand the law of libel so as to violate the constitutional guarantee of free speech. U. S. Const. 1st Amdt. N.Y. Const., art. I, § 8. We may not by judicial rule so confine and fetter public discussion."

This Court has recognized that the law of libel must be "consistent with constitutional privilege",[12] and it has recognized the need for declaring the limitations upon the "power of all American courts, both state and federal, including this one"[13] in respect of the manner

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[12] See *Near* v. *Minnesota*, *supra*.

[13] *Bridges* v. *California*, 314 U.S. 252, 260 (1941).

and extent to which those who make severe public criticism of judicial officers may be subjected to subsequent punishment in summary contempt proceedings.

As the final arbiter of the Federal Constitution, this Court now should define the extent to which the right to make fair comment on matters of public concern is within the constitutional protection of free speech and free press.

This Court Is Presented With the Necessity of Determining the Proper Balance To Be Maintained Between the Right of Every Citizen to Criticize the Conduct of Public Officials and the Right of Public Officials to be Protected From Allegedly Libelous Publications

There is need for a pronouncement by this Court as to the limits of the constitutional protection afforded to those who exercise the right of fair comment. Such a decision would establish a constitutional rule which would eliminate the divergency of views now existing.

In Missouri, Montana and New York, the right of fair comment has been held to touch upon and partake of the constitutional right of free speech and free press. See *Diener* v. *Star-Chronicle Pub. Co., supra; Griffin* v. *Opinion Pub. Co., supra; Julian* v. *American Business Consultants, Inc., supra.*

Under the rule announced in Volume III, *Restatement of the Law of Torts*, recognition is given to the privilege of every citizen freely to express his honest opinion in commenting upon matters of public interest and concern.[14] Such criticism is privileged unless

[14] *Restatement of the Law of Torts*, Volume III, comment at pp. 277, 278:

"If the public is to be aided in forming its judgment upon matters of public interest by a free interchange of opinion, it is essential that honest criticism and comment, no matter how foolish or prejudiced, be privileged. The fact that the criticism is

"made solely for the purpose of causing harm." *Ibid.*, Section 606 (1) (e).

In the case at bar, there was no question but that the plaintiff below sought to suppress the Report of the Grand Jury and that the facts on which the two editorials complained of were based were truly stated. Likewise Respondent, plaintiff below, conceded that neither Petitioner nor its employees bore him any hatred, ill-will or personal animosity (R. 164, 302-308, 362-363, 544, 751, 829). Respondent has not proved that the editorials contained any misstatement of fact. Under the rule announced in the *Restatement of the Law of Torts, supra*, Petitioner's utterance undoubtedly would have been privileged.

Similarly under the law of New York, "fair and honest criticism of the acts of a public official in a matter of public interest are not libelous unless they are written maliciously." *Tracy* v. *Kline & Son, Inc.*, 274 App. Div. 149, 81 N.Y.S. 2d 1 (1948). In fact, the rule in New York as announced in what has become a leading case on the right of fair comment permits the imputation of corruption or dishonorable motives where they are an inference which a fair minded man might reasonably draw from the facts truly stated and

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fantastic is immaterial, and the extravagant form of its expression is unimportant. It is necessary, however, that the comment have some relation to the facts upon which it is made. * * *"

And at p. 278:

"If the publication is made solely from spite or ill will and for the purpose of causing harm to the person criticised, or others, it is not privileged. However, if the criticism is honest and is believed by the critic to be valuable for the public information, the fact that he would have refrained from publishing it if the person criticised had been his friend and not his enemy is not enough to destroy the privilege."

represent the honest opinion of the writer. *Foley v. Press Publishing Company*, 226 App. Div. 535, 235 N.Y.S. 340 (1929).

The English view, which is similar to the New York rule, is set forth in *Silkin v. Beaverbrook Newspapers Ltd.*, [1958] 2 All E.R. 516. As was said by Justice Kenneth Diplock in his summing up in that case (2 All E.R. 516, at p. 517):

> "This is an important case, for we are here concerned with one of the fundamental freedoms—freedom of speech, the right to discuss and criticise the utterances and the actions of public men. Freedom of speech, like the other fundamental freedoms, is freedom under the law, and over the years the law has maintained a balance between the right of the individual, like the plaintiff, whether he is in public life or not, to his unsullied reputation if he deserves it. That is on the one hand. On the other hand, but equally important, is the right of the public, which means you and me, and the newspaper editor and the man who, but for the bus strike, would be on the Clapham omnibus, to express his views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people.***"

In *Bridges v. California*, *supra*, this Court dealt with the power of a state judge to summarily punish as contempt the publication of editorials and a telegram commenting upon cases then pending before the state court, and considered the question whether the actions of the judge constituted an abridgement of rights guaranteed by the First Amendment. There, this Court recognized the need for uniformity where constitutional rights are involved. 314 U.S. 252, 260:

A similar need for uniformity exists in respect of the issues in the case at bar wherein this Court may declare and thus set to rest the constitutional aspects of the right to utilize the guaranty of free speech and press in criticizing the conduct of public officials in matters of public interest and concern.

This Court Should Determine Whether the Rulings of the Trial Court Effectively Deprived Petitioner of Its Rights Under the First and Fourteenth Amendments Which Guarantee Free Speech and Press, and the Right Fairly to Comment Upon and Criticize Public Officials, Their Conduct and Motives

If it be granted that Petitioner had the constitutional right to make fair comment upon and to criticize the conduct and motives of the Respondent, while acting as an elected official of the State of Florida, the question next presented on this record is the extent to which Petitioner was effectively deprived of that right under the rulings of the court below. It is here contended that a citizen's constitutionally protected right of free speech and press was impaired by reason of judicial error in the course of a trial for libel where in the defense of fair comment was established. The trial court effectively deprived Petitioner of its defense of fair comment by the following erroneous rulings.

(a) The Introduction into Evidence of the Opinion of the Supreme Court of Florida

During the course of the trial in the court below, Petitioner asserted the right to have its editorials, and its defense of fair comment considered in the light of the law existing *at the time of publication* in respect of the powers of Dade County, Florida, grand juries to make presentments without also indicting the per-

sons named in the presentment. This was the law[15] in Florida prior to the decision in *State ex rel. Brautigam, supra.* See the opinions in *In re Report of Grand Jury*, 152 Fla. 154, 11 So. 2d 316 (1943), (Defendant's Exhibit B; App. 45a-57a, *infra*); and in *State ex rel. Brautigam*, (Plaintiff's Exhibit 6; App. 37a-44a, *infra*).

In *State ex rel. Brautigam*, which was decided approximately ten months after the editorials were published, the Supreme Court of Florida declared a new and different rule of law when it held that grand juries may not present unless they also indict.

The trial court in the instant case refused to permit Petitioner to introduce into evidence or refer to the Interim Report of the Grand Jury (R. 11-35; Defendant's Exhibit 1), on the ground it was not relevant to the issues (R. 68, 165, 173-174, 292). Notwithstanding that ruling, the trial court, over objections of Petitioner, permitted Respondent to read the opinion of the Supreme Court of Florida in *State ex rel. Brautigam* to the jury, to introduce it into evidence and to utilize that decision throughout the trial to convince the jury that the Supreme Court of Florida had already adjudicated the issues which the jury was to consider (R. 138, 159-160, 165, 232-237, 292, 309, 743-747, 777; Plaintiff's Exhibit 6).

The question arises, it is respectfully submitted, as to whether the infliction of a punitive verdict and judg-

[15] See *In re Report of Grand Jury*, 152 Fla. 154, 11 So. 2d 316 (1943), (App. 45a-57a, *infra*); *Owens v. State*, 59 So. 2d 254 (1952); and *Ryon v. Shaw*, 77 So. 2d 455 (1955). Also see the full discussion of these cases contained in the dissenting opinion of Charles Carroll, J., in the case at bar, (App. 5a, at 21a-27a).

ment upon the Petitioner in these circumstances was consistent with the constitutional privilege of free speech and press.

(b) The Jury Instruction That One Who Imputes Improper Motives To a Public Official Is Absolutely Liable

Over objection of Petitioner, the trial court instructed the jury to the effect that one who imputes dishonorable or corrupt motives to a public official is absolutely liable for defamation notwithstanding the fact that such imputations may have been warranted by the facts truly stated (R. 103, 734, 841). The important question thus presented is whether the right of free speech and press can be rendered meaningless by a rule of law which, in effect, prohibits the utterance even where such an imputation of improper motives may have been fully warranted by the facts. While Petitioner contends that no such imputations were made in the editorials it published, the rule of law declared in the court below, if constitutionally valid, will have far reaching effects. Few if any citizens would dare to exercise rights theoretically secured by the Federal Constitution if no effective constitutional protection is to be afforded them in an action for libel subsequently instituted by the public official whose conduct was questioned.

In *Near* v. *Minnesota*, *supra*, this Court considered the extent to which a newspaper might be subjected to previous restraint because of publications offensive to a state legislature. Here a different form of previous restraint is presented in that the question is to what extent may a newspaper which fairly comments upon and criticizes the conduct of a public official be subjected to subsequent punishment in a libel action

where the record shows there has been no misstatement of the facts and no malice.

(c) Failure To Grant Petitioner's Motion For Judgment In Accordance With Motion For Directed Verdict or For New Trial

Petitioner contended that since all the criteria of the defense of fair comment were fully established, it was entitled to a directed verdict not only as a matter of the law of libel, but also as a matter of constitutional right. Therefore, it is respectfully submitted that this Court should determine whether there is a minimal level or degree of comment on public men and measures which is subject to neither prior restraint nor subsequent punishment under Federal and Florida Constitutions. Otherwise, there can be no real substance to the constitutional right to criticize and comment which is but a part of the broader right of free speech guaranteed to every American citizen.

In summary, the rulings and judgment of the trial court, as affirmed by the District Court of Appeal of Florida, Third District, in respect of the Supreme Court of Florida's opinion in *State ex rel. Brautigam*, in respect of its jury instruction that absolute liability is incurred by those who impute dishonorable or corrupt motives to public officials, however the facts may justify such imputation, and in permitting the jury to consider the case after the defense of fair comment had been established as a matter of law, establish a rule of law which effectively strips the cloak of constitutional privilege from any citizen who dares to speak out on controversial issues.

CONCLUSION

The law declared by the Florida courts in this case merits the careful attention of this Court. It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

[R. 881]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

July Term, A.D. 1958

Monday, November 24, 1958

Case No. 58-409

THE MIAMI HERALD PUBLISHING CO., a Florida corporation,
Appellant,

vs.

DOROTHY M. BRAUTIGAM, as Administratrix of the Estate of George A. Brautigam, Deceased, *Appellee.*

Appellee having moved this court to transfer this appeal to the Supreme Court, under Florida Appellate Rule 2.1a(b)(d), and argument of counsel for the respective parties having been heard thereon after due notice, (and it appearing to this court that inherent in the judgment appealed from there was the construction of controlling provisions of the Florida and Federal Constitutions guaranteeing freedom of the press) as indicated by the answer, par. 15, motion for new trial, etc., assignments of error No. 5 and No. 6, and argument under Point V of appellant's brief, pp. 49-53), and therefore that the judgment was appealable direct to the Supreme Court under Florida Appellate Rule 2.1a(5)(a), it is therefore ordered that the notice of appeal and all other papers filed in this appeal are hereby transferred from this court to the Supreme Court of Florida.

A true Copy

ATTEST:

WILLIAM P. CARTER
Clerk District Court of Appeal,
Third District

[R.-S. Ct. 2-5]

IN THE SUPREME COURT OF FLORIDA

January Term, A.D. 1960

Case No. 30,308

THE MIAMI HERALD PUBLISHING COMPANY, a Florida corporation, *Appellant*,

vs.

DOROTHY M. BRAUTIGAM, as Administratrix of the Estate of George A. Brautigam, Deceased, *Appellee*.

Opinion Filed June 15, 1960

An Appeal from the Circuit Court for Dade County, William A. Herin, Judge.

David W. Dyer, Elisha Hanson (Washington, D. C.), Smathers, Thompson & Dyer, L. S. Bonsteel, Calvin H. Cobb, Jr., (Washington, D. C.) and Emmett E. Tucker, Jr., (Washington, D. C.), for Appellant.

Paul A. Louis, Bertha L. Freidus and Melvin M. Belli (San Francisco, California), for Appellee.

PER CURIAM.

This cause involves a libel action by George Brautigam against the Miami Herald Publishing Company, as publishers of The Miami Herald newspaper. A jury verdict awarded Mr. Brautigam $25,000 compensatory damages and $75,000 punitive damages. Subsequent to the trial court's judgment Mr. Brautigam passed away and his wife was substituted as appellee.

The trial court's decision was appealed to the District Court of Appeal, Third District, which transferred the cause to this court on the ground that

> "inherent in the judgment appealed from there was the construction of controlling provisions of the

Florida and Federal Constitutions guaranteeing freedom of the press."[1]

The instant proceeding has received our laborious consideration. Two oral arguments and many full court conferences have been held as part of our efforts to resolve the vexatious jurisdictional problem involved. Such an exhaustive consideration of this appeal was necessary because of its landmark importance in the framework of our efforts to define the periphery of our jurisdiction as limited by amended Article V of the Florida Constitution.

We have now reached the conclusion that we do not have jurisdiction because the trial court did not construe a controlling provision of the Florida or Federal Constitution.[2]

Our unauthorized exercise of jurisdiction herein would set a precedent requiring us to accept appeals as a matter of right in all libel trials.

There is no feature of this case which distinguishes it from other libel suits as is obvious from the judgment entered in the cause which is as follows:

"GEORGE A. BRAUTIGAM, *Plaintiff*,

vs.

THE MIAMI HERALD PUBLISHING Co., a Florida corporation, *Defendant*.

FINAL JUDGMENT

"THIS ACTION came on for trial in open Court on 10 February 1958. The Jury was impanelled and sworn to try the issues involved. At the close of all the evidence, after hearing the arguments of counsel and the instructions of the Court, the Jury retired and deliberated. Thereafter,

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[1] See Article V, Section 4(2) of the Florida Constitution.

[2] See Beauharnais v. Illinois (1951) 343 U.S. 250, 96 L.Ed. 919; Layne v. Tribune, Fla. 1933, 146 So. 235, 238.

on 14 February 1958, the Jury returned in open Court their verdict, in words and figures as follows:

'In the Circuit Court
Dade County, Florida

No. 38,536

'George A. Brautigam,

vs.

The Miami Herald Publishing Co.,
a Florida corporation

'We, the Jury, find for the Plaintiff, George A. Brautigam, and assess his compensatory damages in the sum of Twenty Five Thousand ($25,000.00) Dollars, and assess his punitive damages in the sum of Seventy Five Thousand ($75,000.00) Dollars.

So say we, all.

/s/ Lester A. York
Foreman

'Dated: February 14, 1958.'

"It Is Hereby Ordered, and Adjudged that the Plaintiff have and recover of and from the Defendant, The Miami Herald Publishing Co., the sum of One Hundred Thousand ($100,000.00) Dollars, together with interest and the costs of this action. For which sum let execution issue.

"Dated at Miami, Dade County, Florida, on this 17 day of February, A. D., 1958."

A decision to take jurisdiction would, therefore, be contrary to amended Article V of the Florida Constitution. Said amendment does not give us jurisdiction by direct appeal in cases involving libel, as it does in capital punishment cases, bond validations and judgments or decrees directly passing upon the validity of a state or federal statute or treaty, unless it be determined that the trial court did in fact construe a controlling provision of either

the Florida or Federal Constitution. For the reasons above stated, it is our opinion that all points raised herein relate to matters within the ordinary appellate jurisdiction of the district courts. Since we have disposed of this case upon jurisdictional grounds, it follows that we have not reached or considered its merits.

Therefore, in accordance with Florida Appellate Rule 2.1a(5)(d), the Notice of Appeal and all papers filed herein should, at the expiration of five days from the filing of this opinion, be transferred to the District Court of Appeal, Third District.

It is so ordered.

THOMAS, C.J., HOBSON, DREW, THORNAL and O'CONNELL, JJ., concur.

TERRELL and ROBERTS, JJ., agree to judgment.

[R. 902-930]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

January Term, A.D. 1961

Case No. 58-409

THE MIAMI HERALD PUBLISHING CO., a Florida corporation, *Appellant*,

vs.

DOROTHY M. BRAUTIGAM, as Administratrix of the Estate of George A. Brautigam, Deceased, *Appellee*.

Opinion Filed March 9, 1961

An Appeal from the Circuit Court for Dade County, William A. Herin, Judge.

Smathers, Thompson & Dyer and Elisha Hanson (Washington, D. C.), for appellant.

Paul A. Louis, Bertha L. Freidus and Melvin M. Belli (San Francisco, Calif.), for appellee.

HORTON, *Chief Judge.*

The appeal in this case was first lodged in this court. Upon motion of the appellee, and after argument of both counsel, the cause was, on November 24, 1958, ordered transferred to the Supreme Court of Florida. On June 15, 1960, the Supreme Court of Florida, by opinion and judgment [1] ordered the cause transferred back to this court, where the matter was orally argued on the merits.

Appellant prosecutes this appeal from a final judgment entered upon a jury verdict in an action for libel.

The record discloses that George Brautigam filed suit against the appellant newspaper alleging that certain editorial articles, published by the appellant, were defamatory. These articles allegedly criticized Brautigam's attempts, in his capacity as State's Attorney, to suppress an interim report of the Dade County Grand Jury for the 1955 Fall Term. The appellant denied the editorials were false or maliciously published but admitted that a demand for retraction had been made and refused. In a separate defense, the appellant alleged that the matters of fact contained in the editorials were true; that the opinions expressed were fair comment, made in good faith, without malice, and were privileged under both the Constitution of the United States and the Constitution of Florida.

The jury returned a verdict awarding $25,000 compensatory damages and $75,000 punitive damages. During the pendency of appellate proceedings, Brautigam passed away and his wife was substituted as appellee.

This controversy can be more easily understood when visualized against the background of public events which transpired in Dade County during the spring of 1956. It was during this period that public attention was focused

[1] Miami Herald Publishing Co. v. Brautigam, Fla. 1960, 121 So. 2d 431.

upon the administration of justice in Dade County. It was a "poorly kept secret" and "common gossip" that the Grand Jury was investigating the conduct of certain members of the judiciary and bar. On the morning of April 26, 1956, Brautigam, as State's Attorney, was requested by the Grand Jury to examine its interim report. Upon examination he advised that the report was in an illegal form and should be redrafted. Later the same day, Brautigam was advised that the Grand Jury was going to file its report in substantially the same form as before. He then appeared before the court when the report was about to be filed and requested the court to withhold filing of the report until he, Brautigam, could file a written motion setting out the reasons why it was invalid and should not be made a part of the public records. This request was granted and the court set the matter for argument on the afternoon of Monday, April 30, 1956.

A written motion to suppress the report was filed by Brautigam and copies distributed to all news media, including the appellant. This motion clearly stated that neither Brautigam nor any member of his staff was involved in the Grand Jury report.

Pursuant to its news coverage of the story, the appellant published the following editorial in its newspaper issue of Saturday, April 28, 1956:

> "People Have the Right to Know
>
> "Why Does State Attorney
> Muzzle the Grand Jury?
>
> "The action of George A. Brautigam, state attorney, in throwing a roadblock in front of a hard working, conscientious Grand Jury, raises two immediate questions:
>
> "'Is he afraid of something, or of someone?'
>
> "'Is he trying to protect someone?'

"Neither may be the reason, but the State Attorney has invited both questions.

"THE GRAND JURY is the people's agency of investigation.

"It supplements the work of the State Attorney, who is the people's prosecutor in important cases.

"His office, however, is not above the Grand Jury's attention.

"When the State Attorney and the Grand Jury are in conflict, as in this instance, the people's rights are in jeopardy.

"In asking Judges [sic] Robert L. Floyd of Circuit Court to withhold the jury's report, Brautigam is off the track of his public responsibility. We think the judge should have told him so instead of granting his request.

• • •

"As LONG as Brautigam stands in the untenable position of asking the court to keep the jury's findings from the people he invites suspicion.

"He can remove it only by reversing his course: By making available to the people, who have the right to know, what the Grand Jury has uncovered.

"As it stands, Brautigam, the man the people elected to represent them, has run out on them.

"Who will speak for the people in Judge Floyd's court Monday?"

Upon reading this editorial, Brautigam visited the office of appellant's managing editor and voiced his objection to the unfair manner in which his actions were being reported. He requested his side of the story be published.

Thereafter, on Monday, April 30, 1956, the appellant published the following editorial:

"Who Will Represent the Public?

"State Attorney Brautigam Runs Out on the People

"This afternoon at 2 o'clock, the people's right to know what its own agency, the Grand Jury, is doing will be tested before Judge Robert L. Floyd in Circuit Court.

"Who will represent the people in this outlandish situation in which they have been blocked by court order from being told what their Grand Jury wants to tell them in the interest of law and order.

"State Attorney George Brautigam was permitted by Judge Floyd to withhold release of the jury's report until Brautigam had a chance to review the contents. It was highly unusual, if not unprecedented procedure.

"Brautigam is the people's lawyer through the office that he holds.

• • •

"Judge Floyd should take full cognizance of the fact that in seeking even a temporary suppression of the jury's report, Brautigam was not the servant of the people. He ran out on them.

"Judge Floyd should see to it that the people are ably and immediately represented if he feels that his judicial position prevents him from assuring the people in their right to know.

"The Dade County Grand Jury Association should get in touch with Gov. LeRoy Collins, point out that Brautigam turned his back on the people who employ him as well as on his job when he got the court to hold release of the jury's report, and demand his replacement.

"The people of this county will watch with concern and long memories how their rights are safe-guarded by interested officialdom this afternoon."

After reading this editorial in an early edition of the Monday paper, Brautigam, by telegram addressed to the managing editor, demanded a retraction. The appellant refused the demand.

At the hearing on the Grand Jury report, the circuit court overruled Brautigam's motion to suppress and ordered the report spread on the public records. This order was subsequently reversed on appeal and the report ordered expunged by the Supreme Court of Florida. State v. Interim Report of Grand Jury, Fla. 1957, 93 So. 2d 99. In May, 1956, Brautigam was defeated in his bid for re-election as State's Attorney.

The appellant contends the judgment deprived it of the right of free speech and fair comment guaranteed by the First and Fourteenth Amendments of the United States Constitution, as well as Section XIII of the Declaration of Rights of the Florida Constitution.

In the United States and this state, every citizen is guaranteed the right of fair expression. This right includes freedom of speech and of the press. However, both the citizen and the newspaper are held to the same liability for the abuse of these rights. Freedom of speech and freedom of the press do not carry with them freedom from responsibility in the misuse of those rights. See Ross v. Gore, Fla. 1950, 48 So. 2d 412; Pennekamp v. State of Florida, 328 U.S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295.

In contrast to the right of free speech, the law of libel exists as limitation on the right of every citizen to write freely. It has long been established that the guarantees of free speech and press do not render the publisher of lewd and obscene materials, profane statements or de-

famatory utterances immune. See Chaplinsky v. State of New Hampshire, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031; Layne v. Tribune Co., 108 Fla. 177, 146 So. 284. The difficulty in construing these constitutional guarantees arises when the right of free expression collides with an individual's right to the protection of his good name. These conflicts defy precise analysis. However, it is sufficient for this discussion to say that the rights of free speech and press were designed primarily to prevent interference by the government with a man's speech or writing but not to obviate his responsibility for what has been published.

The reported decisions of this state, as well as others, clearly establish that a publication is libelous, per se; that is, actionable, per se; without a showing of special damage, if it imputes to another (a) a criminal offense amounting to a felony; or (b) a presently existing venereal or other loathsome and communicable disease; or (c) conduct, characteristics, or a condition incompatible with the proper exercise of his lawful business, trade, profession or office; or (d) the other being a woman, acts of unchastity. Teare v. Local Union No. 295, Fla. 1957, 98 So. 2d 79.

The principal defenses to an action upon a publication, libelous, per se, are consent, justification and privilege. The defense of privilege has been by some subdivided into three distinct classifications, i.e., (1) absolute privilege; (2) qualified privilege; and (3) fair comment. See 3 Restatement, Torts, Chap. 25. Others classify the defense of fair comment as merely another aspect of the defense of qualified privilege. See Prosser, Torts, 2d Ed., § 95, p. 607. Cf. Jones v. Townsend's Administratrix, 21 Fla. 431; and Montgomery v. Knox, 22 Fla. 595, 3 So. 211; with State ex rel. Arnold v. Chase, 94 Fla. 1071, 114 So. 856; and White v. Fletcher, Fla. 1956, 90 So. 2d 129.

3 Restatement, Torts, § 606, p. 275, defines privileged criticism (fair comment) thusly:

"§ 606. General Principle:

"(1) Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory,

"(a) is upon,

(i) a true or privileged statement of fact, or

(ii) upon facts otherwise known or available to the recipient as a member of the public, and

"(b) represents the actual opinion of the critic, and

"(c) is not made solely for the purpose of causing harm to the other.

"(2) Criticism of the private conduct or character of another who is engaged in activities of public concern, in so far as his private conduct or character affects his public conduct, is privileged, if the criticism, although defamatory, complies with the requirements of Clauses (a), (b) and (c) of Subsection (1) and, in addition, is one which a man of reasonable intelligence and judgment might make."

Newell, Slander and Libel, p. 516, says:

"Every person has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. Such comments are not libelous, however severe in their terms, unless they are written intemperately and maliciously. Every citizen has full freedom of speech on such subjects, but he must not abuse it. The general rule to be adhered to in criticising or commenting upon matters of public interest is to confine the comments to the matter itself, and not to descend

to personal attacks on private character or imputations of unworthy motives."

The press, while guaranteed the right to publish the truth supported by good motives, has no right to publish falsehoods to the injury of others. A high degree of care is required by law to be exercised by newspaper publishers to avoid the commission of wrongs in the publication of false articles or news of a personal nature concerning which the publisher holds himself or his agents out as author and composer. See Layne v. Tribune Co., supra.[2]

The great majority of American courts hold that no comment can be fair if it is based on misstatements of fact. See Noel, "Defamation of Public Officers and Candidates," 49 Colum. L. Rev. 875, 896. We concur in this view and align ourselves with the majority.

The appellant urges that we reverse the trial court and adopt a rule by which corrupt or dishonorable motives may be imputed to others *where such imputations are warranted by the facts.* Such a construction of the defense of fair comment has been accepted in England and a minority of American courts. See Gatley, Libel and Slander, 4th Ed., p. 239, and Foley v. Press Pub. Co., N.Y. App. 1929, 235 N.Y.S. 349. Cf. Rathkopf v. Walker, 190 Misc. 168, 73 N.Y.S. 2d 111 and 85 N.Y.S. 2d 351.

It is our opinion that the better view supports the holding that the defense does not embrace the right to falsely impute one's motives, want of loyalty or mis-

[2] Newspapers are not held to the same degree of care in reproducing outside press dispatches as they are in publishing original items. Absent a showing of any recklessness or carelessness, the mere reproduction by a newspaper of actually false but apparently authentic news dispatches from generally recognized reliable sources, does not, through publication alone, render the publication per se actionable.

conduct in office. See State ex rel. Arnold v. Chase, supra; Jones v. Townsend's Administratrix, supra; and McClellan v. L'Engle, 74 Fla. 581, 77 So. 270. To excuse such an attack, the critic must show the truth of what he has uttered. This, of course, does not include those instances described in Rathkopf v. Walker, supra, as "mere exaggeration, slight irony, or wit, or all those delightful touches of style which go to make an article readable, do not push beyond the limitation of fair comment. Facts do not cease to be facts because they are mixed with the fair and expectant comment of the story teller, who adds to the recital a little touch by his piquant pen."

The appellant contends that the trial judge erroneously failed to instruct the jury that the burden of proof was upon Brautigam to show the falsity of the editorials and the newspaper's actual malice in the publication thereof. The trial judge did instruct the jury that the defense of truth, plus good motives and fair comment, are affirmative defenses as to which the defendant has the burden of proof. He further charged the jury, as a matter of law, that the editorials were matters of public interest.

As to the defense of fair comment, the jury was instructed that if it should find the editorials met the test of fair comment, the defendant would have then carried the burden of proof as to this affirmative defense, and in such event, the burden was on the plaintiff to prove the defendant's publication of the editorials was motivated by actual malice.

The trial judge's instructions to the jury upon the burden of proof constitute a correct and fair statement of the law, and the refusal to give appellant's requested instructions on this issue was not error. See Edwards v. Doherty, Fla. 1954, 74 So. 2d 686. See also White v. Fletcher, supra; Abraham v. Baldwin, 52 Fla. 151, 42 So.

591; Crowell-Collier Publishing Co. v. Caldwell, 5 Cir., 1948, 170 F. 2d 941.

The appellant further complains that the court erred in permitting the issue of punitive damages to go to the jury. As stated in Phillips & Sons v. Kilgore, 152 Fla. 578, 12 So. 2d 465:

> "Punitive or exemplary damages is an amount allowed over and above actual or compensatory damages. Its allowance depends on malice, moral turpitude, wantonness, or the outrageousness of the tort and is awarded as a deterrent to others inclined to commit a like offense. It is in the province of the trial court to determine as a matter of law whether or not there is a basis for punitive damages and instruct the jury accordingly. Whether or not the elements are present to warrant it is for the jury in the light of all the facts of the case."

From our review of the record, we are of the opinion that the trial judge acted within his sound judicial discretion when he submitted this issue to the jury for its consideration.

We have considered the remaining questions presented by the appellant but fail to find any harmful or prejudicial error.

We conclude the evidence presented to the jury was sufficient, if believed, to support the judgment and that it should be affirmed.

Affirmed.

PEARSON, J., concurs.

CARROLL, CHAS., J., dissents. ~~with opinion.~~

CARROLL, CHAS., J. (dissenting).

I respectfully dissent from the judgment of affirmance. The admission of certain evidence over defendant's

objection, and the giving of a charge concerning fair comment, both of which appear to have been erroneous and highly prejudicial, require reversal and a new trial.

First - - and this was a fatal error which permeated the entire case - - through a series of rulings, plaintiff's counsel was permitted to file in evidence and present and explain before the jury a judgment and opinion of the Supreme Court of Florida,[1] hereafter referred to as the Interim Report case, which was rendered ten months after the publications, and by which the Supreme Court ruled that the grand jury presentment involved here should have been suppressed and ordered it expunged from the records, holding it was proper for the state attorney to suppress the grand jury report and presentment dealing with a judge of the court and certain lawyers,[2] and com-

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[1] State ex rel. Brautigam v. Interim Report of Grand Jury, Fla. 1957, 93 So. 2d 99. The editorials involved in the libel action were published on April 28 and April 30, 1956. The decision in the Interim Report case was rendered February 27, 1957. The libel action was filed March 21, 1957, and the trial commenced February 8, 1958.

[2] The conclusion of the grand jury as expressed in the presentment was referred to and stated by the Supreme Court in the Interim Report case (93 So. 2d at 101), as follows: "The jurors conclude that '[i]n view of the disregard of the law, in view of the squandering of assets of an estate and the allowance of exorbitant fees, in view of the connivance of the Court and its appointees, and in view of conduct unbecoming Judges and members of the Dade County Bar,' the circuit judges in question were 'unfit to serve and should resign from office' and the lawyers in question were 'unfit to practice law and to perform the functions of officers of the court.' They called upon the Board of Governors of The Florida Bar and the Grievance Committee for the Eleventh Judicial Circuit of The Florida Bar 'to review the conduct of the participants in this case with a view to disciplinary action and disbarment.'"

mending the state attorney for having attempted to do so.[13]

~~When the court allowed the opinion in that case to go before the jury, the result was that the publications were displayed to the jury against a backdrop which, though it is assumed was not so intended, nevertheless served the purpose of creating a state of law and rules of conduct for the state attorney so favorable to the latter as obviously to deprive the defendant of the defense of fair comment on which defendant might have expected to succeed had its right been recognized and preserved to have its publications judged in the light of the law and duties of the grand jury and state attorney as they were entitled to be understood by the publisher and by the public at the time when the publications were made.~~

At the risk of oversimplification, it may be said that the manner and extent to which the defendant publisher was deprived of the benefit of the defense of fair comment and, therefore, of its constitutionally guaranteed freedom of speech and of the press, was this: Under the law upon

[13] When the grand jury submitted the report for filing on Thursday, April 25, 1956, the court acceded to an oral request of the state attorney to hold up the filing thereof until he could prepare and submit a written motion to suppress it, and the court set a hearing thereon for Monday afternoon, April 30, 1956, at which time, after hearing, the circuit court ruled, on the basis of the prior decisions relating to grand jury presentments, that the report was entitled to be filed, and denied the motion to suppress. The two editorials were published in the interval, while the filing of the report was temporarily held up, on the mornings of April 28 and April 30, 1956. Thus while the Interim Report case (93 So. 2d 99) dealt with the right of the grand jury to file the very report which was involved here, and with whether there is a public interest to be served in that connection, this appeal was a matter in which The Miami Herald Publishing Co. was not a party and the proceeding was a collateral one as far as the publisher was concerned, the appeal being one by the State Attorney as the appellant against the interim report as the appellee.

which the publisher was entitled to rely when the publications were made, the defendant publisher might or might not have succeeded before a jury on the defense of fair comment, but on the basis on which this case was tried, with the subsequently rendered Interim Report case opinion of the Supreme Court of Florida before the jury, the defense was doomed.

The prominence given to that subsequent decision, and the degree to which the plaintiff relied on it as the basis on which to gauge the propriety and reasonableness of the publications as comment and criticism of the conduct of a public official and on a matter of public interest, are apparent from the record. That Supreme Court opinion was brought before the jury at the outset of the trial by plaintiff's counsel in his opening statement. R. 159-160. Defendant's objection and its motion for a mistrial were denied. R. 165. Later, during the presentation of the plaintiff's case, the opinion was introduced into evidence by plaintiff's counsel (R. 232 et seq.), and was read in full to the jury. R. 237. Defendant's objection to its introduction was denied. R. 236. Again, in final argument or summation, it was reviewed and read from to the jury by plaintiff's counsel. R. 744-747. Error was assigned and the point was made and argued in appellant's brief.

The law is settled that publications claimed to be libelous are to be judged as of the time and surrounding circumstances when they were made. Thus, the publications must be judged in relation to the understanding and opinion of the publisher and the public at the time which and in the community where the publications appeared. See Myers v. Hodges, 53 Fla. 197, 44 So. 357, 365; Massee v. Williams, 6 Cir. 1913, 207 Fed. 222, 231; Sweeney v. Schenectady Union Pub. Co., 2 Cir. 1941, 122 F. 2d 288, 290; Spanel v. Pegler, 7 Cir. 1947, 160 F. 2d 619, 622; Holden v. American News Co., E.D. Wash. 1943, 52 F.

Supp. 24, 31; Knapp v. Post Printing & Publishing Co., 111 Colo. 492, 144 P. 2d 981, 984; Tidmore v. Mills, 33 Ala. App. 243, 32 So. 2d 769, 775; Harper, Privileged Defamation, 22 Va. L. Rev. 642, 653 (1936); Note, 15 So. Cal. L. Rev. 274, 275 (1942). See also, Klein v. Belle Alkali Company, 4 Cir. 1956, 229 F. 2d 658, 660. We need not go outside of the State of Florida for authority to support that proposition. In Myers v. Hodges, supra, the Supreme Court of Florida said (44 So. at 365):

> "In the instant case, how could the court or jury know from evidence of plaintiff that the terms of the publication or bill of complaint were in manifest excess of the occasion, or went beyond what was reasonable in imputing crime, or contained strictures on motives and conduct not warranted by the facts? The plaintiff failed to show these facts to the jury. The plaintiff did not show by an exhibition of the entire bill of complaint or otherwise the occasion for the use of the defamatory matter, so that the court or jury could see whether the defamatory matter was in excess of the occasion, or went beyond what was reasonable in imputing crime, or contained strictures on motives and conduct not warranted by the facts. The facts showing the occasion of the use of the defamatory matter were not given in evidence.
>
> "As we have seen, where the matter complained of is qualifiedly privileged, the burden of proving malice lies on the plaintiff, and, if the evidence adduced is equally consistent with either the existence or non-existence of malice, there can be no recovery, for there is nothing to rebut the presumption which has arisen in favor of the defendant from the privileged publication. Newell on Slander and Libel, §§ 23, 24.
>
> "The burden of proving malice being on the plaintiff, who relied only upon the intrinsic evidence of malice arising from the violence of defendant's language, it

became incumbent upon the plaintiff to show by the entire bill of complaint, or some other competent evidence, that the defamatory matter was in excess of the occasion, or inconsistent with the nonexistence of malice. The plaintiff, however, failed to make this proof, and, the evidence being demurred to, the court properly sustained the demurrer to the evidence, as there was nothing to rebut the presumption which arose in favor of the defendant from the qualifiedly privileged publication."

If, as held in the Myers case, it was necessary for the plaintiff to show the facts and circumstances which were applicable at the time of the alleged libelous publication in order to determine whether it was "in manifest excess of the occasion or went beyond what was reasonable in imputing crime, or contained strictures on motives and conduct not warranted by the facts," then it was error for the plaintiff to show in evidence, as the basis for such a test of the publications, the circumstances as determined by the Supreme Court in the subsequent opinion, rather than those on which the publisher relied or formed his understanding. That was clearly so in the present case, because the circumstances which prompted the publications, and which would have to be looked to for their justification, related to the nature and extent of the right of a grand jury to file a presentment against a public official, as those matters were reasonably understood to be, on the strength of cases then decided, and, on the same basis, the public interest in such reports being made known. There was no problem as to the other facts, such as that a grand jury was in session; that it was common knowledge that it was investigating a judge or judges of the court; that it was ready to make a report based on its investigation and that the state attorney was seeking to suppress the report or the portion of it dealing with such investigation.

If the publisher, as any other lay member of the public, on the basis of his general understanding of law and custom as it was at that time, was justified in believing that a grand jury could investigate officials and file presentments against them critical of their conduct; that such grand jury investigations and reports were vital to the public interest, and should be filed and made known even though they might go so far as to impugn the character of public officials and report them as being unqualified or unfit to remain in office, and that if they should contain matter against an official which would be held to impugn him *without cause*, that the precedents in Florida were that the report shall be made public, following which some part might, if found necessary, be expunged later on the official's motion, and that it was in the public interest, and, therefore, incumbent upon the state attorney to bring the report out rather than to suppress it, then it would be a question for the jury to determine whether the comments and the opinions of the publisher, readily determinable as such, which questioned the state attorney's motives in seeking to block the filing of the report and which classified such conduct as a serious breach of his duty to the public, were justified under the circumstances and within the range of the publisher's qualified privilege of fair comment and constitutionally guaranteed freedoms of speech and of the press.

Tedious though the process may be, it seems necessary to examine the holdings in certain earlier cases dealing with grand jury presentments which fixed the law as it stood when the editorials were published, and to contrast the subsequent decision in the Interim Report case.

The earlier cases gave no reason to assume or believe that grand jury presentments criticizing public officials and even impugning their character or motives or concluding that they might be unfit for office, were not required to be filed and made public, although if in some particulars

they went beyond what was permissible, the excessive portion could be expected to be expunged later on the suit or motion of the official involved. See In re Report of Grand Jury, (1943) 152 Fla. 154, 11 So. 2d 316, hereinafter referred to as the Graves case; Owens v. State, Fla. 1952, 59 So. 2d 254; and Ryon v. Shaw, Fla. 1955, 77 So. 2d 455.

In the Graves case, a grand jury report on a constable presented him as being guilty of misconduct in office for which he could have been indicted, but for which instead it was recommended that he be removed from office.[4] In Owens, the Supreme Court affirmed an order denying a motion of members of a city council to expunge a grand jury presentment which reported they had shown gross incompetence in handling taxpayers' money in relation to issuance of revenue bonds and an award of a contract for installation of waterworks. The filing of that report was considered appropriate, and it was allowed to stand. In Ryon, a public school commissary manager, whom a grand jury presented as not having "the qualifications to head a department that specializes in child nutrition and education," sued the grand jurors for libel. The Supreme Court affirmed the dismissal of his complaint on holding that the presentment was proper to be filed against him.

True, in the Graves case the Supreme Court stated certain limitations, saying a grand jury would "not be

[4] In the Graves case the presentment was severe. The report stated the constable had (1) permitted gambling, (2) used helpers with criminal records and gambling connections, (3) misused his position to exert duress on businessmen, and (4) improperly used his power to employ and handle deputies; and then without bringing in an indictment, recommended that the constable be removed from office. The Supreme Court held the official was not entitled to have that report against him expunged, but the court did expunge a conclusion expressed by the grand jury, which, stated in the vernacular, was to the effect that they did not indict him because they felt he would beat the rap.

permitted to single out persons in civil or official position to impugn their motives, or by word, imputation, or innuendo hold them to scorn or criticism," nor "to speak of the general qualification or moral fitness of one to hold an office or position," adding, however, "but whether or not a county office is being conducted according to law and good morals is at all times within the jurisdiction of the grand jury to investigate." But in reading those limitations it must be noted that the court felt that what the grand jury said about the misconduct of the constable and his unfitness for office did not exceed the stated limits. In the Owens and Ryon cases, those limitations were referred to, but those cases qualified the limitations by saying that such things could not be stated *without cause*, thus inviting their interpretation as holding that an official's character and motives could be impugned and his unfitness for office reported when there was cause to do so. Nowhere in those three earlier decisions had the Supreme Court held or said that reports accusing officials of misconduct in office and recommending their removal, or suggesting their unfitness, should be suppressed and not filed. Rather those decisions had suggested and even demonstrated that reports which appeared to be of that character would be filed and even approved. If what was said about the officials in these three cases did not amount to impugning their character and motives, or passing on the question of their fitness to serve, the distinction is fine, and one which a layman hardly would be expected to recognize. Also, one reading those earlier decisions would be most likely to interpret them as having held that the interest of the public in having such presentments made known was far greater than the incidental injury and embarrassment which the process might impose on the official involved. There is a temptation here to quote at length from these three cases on that subject. To do so would unduly extend an already long opinion. Attention is directed to what was said in the Graves case (11 So. 2d

at 319) about the value to the people and to democracy of being able to know, through reports thereon by the grand jury, when public trusts are being abused by officials; and regarding the grand jury as important to the people through making known to the public the deficiencies ~~of~~ unfitness, ~~were~~ where so found, of its servants; and the rejection there of the contention that such action by the grand jury should not be substituted for orderly processes of the law in regard to official misconduct.

In the Owens case (59 So. 2d at 256) the power of the grand jury to investigate and make a fair report on the misconduct of officials "whatever the delinquency may be" was reiterated, with the comment that such could be done whether or not they were charged with crime. Also, in the Ryon case (77 So. 2d at 457) in which the grand jury reported that an officeholder was unqualified, and therefore unfit to serve in the position he held, the court stated that such a presentment is "one of the safeguards of democratic government," and that the democratic process required that the grand jury be permitted to tell the truth of what it finds regarding the officials it investigates. The court in that case went on to say that there is "no greater deterrent to evil, incompetent and corrupt government than publicity," adding that grand jury investigations and reports are a means to that end and that so long as they are accomplished within reasonable bounds courts are without power to interfere with the process.

In the Ryon case (the later Interim Report case to the contrary) it was expressly held that a grand jury could publish "false and defamatory matter," if it has some relationship to the cause at hand. Also, it should be noted that in the Graves case (again with the Interim Report case to the contrary) the contention by the official who was castigated in that report that it "deprives him of the right to be heard in his defense, the right to face his

accusers and to answer the charge against him," was rejected by the Supreme Court with the answer that such was the nature of grand jury investigations; and the right of the grand jury to so act, rather than to indict him, was there approved.

A casual reading of the later Interim Report case (State ex rel. Brautigam v. Interim Report of Grand Jury, Fla. 1957, 93 So. 2d 99) reveals certain changes of view from those expressed in the earlier decisions, and that they were such, when shown to the jury, as to compel a finding that the publications were not justified.

In that subsequent case it was held that a presentment against an official which slanders him and challenges his fitness to serve in his office, is without jurisdiction and may not be filed unless followed by an indictment, and that if indictable offenses are disclosed to the grand jury on the investigation, they should indict instead of filing a presentment. Yet surely one would have been justified in not construing the earlier cases as so holding. In the Graves case the court had recognized that the required charges to the grand jury include their duty, as specified by § 8215, C.G.L. 1927 (now § 932.15, Fla. Stat., F.S.A.), to "present every offense against the penal laws of the State, whether any specific punishment is pointed out or not," and that was held, in the Graves case, to warrant a presentment which recommended that an officer be removed from office on finding misconduct for which he could have been, but was not, indicted. Parenthetically, in the later Interim Report case, the court distinguished the Graves case by explaining that the constable who was the subject of the presentment there, had previously been indicted. The opinion in the Graves case revealed that Graves had been indicted five years earlier for some offense or offenses not shown, but had never been brought to trial. In any event, the publisher, at the time of writing the editorials, would have no way of knowing that the

Graves case could not be relied on, if indeed it could not. Moreover, both the earlier Owens and Ryon cases lent confirmation to the view that such presentments could be filed without being accompanied or followed by an indictment. More than that, the learned judge before whom that grand jury was impaneled had so charged them, in accordance with the statute. R. 293-4.[15] It must not be overlooked that when, after submission to him of the grand jury report or presentment the same circuit judge heard the motion to suppress, after the editorials were published, he felt (even knowing all that was in the report), as had the publisher (without knowing exactly what was therein), that the report of presentment in question could not be suppressed, and must be filed and he so ordered. That the circuit judge so concluded on the basis of the law as made by the earlier cases was recognized in the later Interim Report case opinion, where the Supreme Court said: "The assigned judge was of the opinion that the investigation and report were authorized under the decisions of this court in In re Report of Grand Jury [Graves case], 1943, 152 Fla. 454, 11 So. 2d 316; Owens v. State, Fla. 1952, 59 So. 2d 254; and Ryon v. Shaw, Fla.

[15] "The grand jury is an investigative and inquisitorial body. It does not try cases or render verdicts. It investigates crimes and other matters and conditions which affect the morals, the health, the safety and the general welfare of the people of the county. It is the guardian of the rights of the people. It is a branch of the government to which a citizen can appeal for aid when public officers and employees who are charged with the administration and enforcement of the laws of the State refuse or fail to discharge faithfully their duties.

"As I have indicated, you are not required to limit or restrict your investigations to crime. You may also make presentments and reports as to other matters and conditions which affect the public morals, health, safety or general welfare. You may investigate state, county and municipal officers and recommend their removal or recall for malfeasance, misfeasance, neglect of duty, incompetence or other official misconduct although no indictable criminal offense is involved."

1955, 77 So. 2d 455, and declined to grant the State Attorney's motion to suppress the portion of the interim report in question."

Next, as to the matter of public interest and the degree of public interest in having such grand jury investigation reports or presentments made public. It has been shown above how the earlier cases appeared to place great emphasis on the benefit to the public, as being a paramount reason for such reports to be made public, and outweighing the plight of the official thus presented, even if the report slandered him and suggested him unfit to serve in his office. While a judge or a layman might well so conclude from the earlier cases, the later Interim Report case could not be so construed. The jury could accept the Interim Report case as holding that the interest of the official presented, if he is slandered and suggested unfit, is paramount to the interest which the public may have in knowing the facts and conclusions of the grand jury regarding such official from its investigation. Where, in Graves, the court had regarded the public interest in publishing such reports to surmount the inability of the official presented to defend himself or be confronted by his accusers, in the later Interim Report case the court expressed at length the view that such a presentment, without indictment, was a fatal injury to an official because it could not be answered and defended and tried, clearly implying that the public interest was in the suppression of such a report, rather than in having it made public.

That change of view in the Interim Report case was of particular significance in the trial of this case, because where a judge or layman might reasonably see, from the prior decisions, a strong policy and need to make such reports public, and, therefore, reasonably conclude that the state attorney, as the prosecuting official, would be protecting officials presented therein who by law were not entitled to protection against publication of the report, and would

be going clearly against public need and interest, none of that could be assumed or concluded under the later Interim Report case.

~~Would a publisher be justified in assuming that a presentment against officials which the state attorney was trying to suppress was required to be filed, in the face of the later Interim Report case holding a presentment, if it was thought to contain excessive findings or conclusions against an official investigated, could, in the discretion of the state attorney and the court, be suppressed and its contents never known. How could a publisher assume that the public interest lay in bringing to light results of the grand jury's investigation of the conduct of an official, in the face of the Interim Report case holding that if the report goes too far, the former practice of filing it and then expunging any excessive matter on motion of the official, is not to be pursued, but rather that the report is without jurisdiction and should not be made public. And, finally, how could a publisher assume that a state attorney, by attempting to suppress a grand jury presentment against an official, was guilty of misconduct and failing in his duty to the public, in the face of the Interim Report opinion which held that his duty lay the other way, to move to suppress the report if he felt it contained excessive matter towards the official, and which commended him for doing the very thing which the publisher, no doubt relying on the earlier decisions, had felt was a serious breach of duty and a grievous public wrong.~~

Here, again, it must be noted that the prejudicial effect of the introduction into evidence of the Supreme Court opinion in the Interim Report case does not hinge so much on what judges and lawyers may conclude as to whether and to what extent the latter case overruled the earlier cases or changed, revised or modified the law as stated in them, but rather whether one reasonably could have found in the earlier cases ground or reason upon which to base the

assumptions and the opinions as to the rights and wrongs which were dealt with in the editorials, and whether, on the other hand, when shown the Interim Report opinion which to them then would be the last word of the Supreme Court of Florida, the jury would not feel compelled to conclude that the later Interim Report decision controlled and that it left no room for an attack on the action of the state attorney.

Second. A charge given to the jury in the case, dealing with the defense of fair comment, was erroneous and prejudicial such as to require a new trial. The charge was one requested by the plaintiff. It was objected to, and its use was challenged on motion for new trial, assigned as error and made the subject of argument in the appellant's brief.

The charge in question was as follows:

> "If you find that the language in either or both of the editorials complained of is not free from the imputation of dishonorable or corrupt motives, then I charge you that the defendant has exceeded the bounds of fair comment and you should find for the plaintiff as to the defendant's liability arising from the publication of either or both of the editorials in question."

That charge told the jury that they should find for the plaintiff if they found that either of the publications contained an "imputation of dishonorable or corrupt motives." The charge made no exception. It imposed absolute liability if dishonorable of corrupt motives were imputed.

The error was in giving that charge in that absolute form, that is, as appellant points out, the charge was erroneous and prejudicial because it did not add, as the law provides, the exception that such imputations could be made within the orbit of fair comment, if they were based on true facts and warranted thereby.

The majority opinion does not reject appellant's contention that facts and circumstances may warrant such imputations, but approves the challenged charge by substituting and stating a different rule that "the defense (of fair comment) does not embrace the right to falsely impute ones motives, want of loyalty or misconduct in office." I find no contention of the appellant to the contrary of that proposition.

But the charge which is here singled out as constituting reversible error did not concern that rule. The validity of the charge, and through it, of the trial, depends on whether a newspaper comment on an official's conduct[6] and regarding a matter of public interest,[7] which impugns the official's character and motives as the result of certain official conduct understood by the publisher to be a serious breach of his duty to the public, prompts absolute liability for libel because of such imputations, or whether there may, in law, be facts and circumstances which could warrant such imputations or opinions.

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[6] The invitation to criticism which the holding of public office produces was commented on by the Supreme Court of Florida in White v. Fletcher, Fla. 1956, 90 So. 2d 129, 131, as follows: "'As expressed by Mr. Justice Terrell in Kennett v. Barber, 159 Fla. 81, 31 So. 2d 44, 46, this Court held:

"'We think the rule is now generally accepted that any one who seeks public employment or public office or who makes his living by dealing with the public or otherwise seeks public patronage, submits his private character to the scrutiny of those whose patronage he implores, and that *they* may determine whether it squares with such a standard of integrity and correct morals as warrants their approval.' (Emphasis added.)"

[7] The reference made in Crowell-Collier Pub. Co. v. Caldwell, 5 Cir. 1948, 170 F. 2d 941, 943, to the susceptibility of critical comment of matters of public interest, is applicable here:

> "* * * That there is a qualified privilege to publish matters affecting the interest of the general public, there is no doubt, nor any that the publication in this case had to do with such matters."

The approved rule is that comments or opinions criticizing public officials may contain imputations of corrupt or dishonorable motives, when such imputations are reasonably warranted by facts truly stated. See Myers v. Hodges, supra, 53 Fla. 197, 44 So. 357, 365; Merriman v. Lewis, 141 Fla. 832, 194 So. 349; Kennett v. Barber, 159 Fla. 81, 31 So. 2d 44, 46; Brinkley v. Fishbein, 5 Cir. 1940, 110 F. 2d 62, 64; Potts v. Dies, D.C. 1942, 132 F. 2d 734; De Savitsch v. Patterson, D.C. 1946, 159 F. 2d 15, 16-17; Caldwell v. Crowell-Collier Pub. Co., 5 Cir. 1947, 161 F. 2d 333, 336; Golden North Airways v. Tanana Publishing Company, 9 Cir. 1954, 218 F. 2d 612, 627; Reynolds v. Arentz, D. Nev. 1954, 119 F. Supp. 82, 86; Howard v. Southern California Associated Newspapers, 95 Cal. App. 2d 580, 213 P. 2d 399 (1950); Sheehan v. Tobin, 326 Mass. 185, 93 N.E. 2d 524, 529 (1950); Griffin v. Opinion Pub. Co., 114 Mont. 502, 138 P. 2d 580 (1943); Leers v. Green, 24 N.J. 239, 131 A. 2d 781, 789 (1957); Mick v. American Dental Association, 49 N.J. Super 262, 139 A. 2d 570, 580 (1958); Cohalan v. New York Tribune, 172 Misc. 20, 13 N.Y.S. 2d 58 (1939); Shenkman v. O'Malley, 1 Misc. 2d 794, 147 N.Y.S. 2d 87, 90 (1955); Cheatum v. Wehle, 6 Misc. 2d 988, 167 N.Y.S. 2d 839, 841 (1957), mod. and aff'd. 5 A.D. 2d 448, 172 N.Y.S. 2d 62; Owens v. Scott Publishing Company, 46 Wash. 2d 666, 284 P. 2d 296, 303 (1955); 53 C.J.S., Libel and Slander, § 131(3); III Restatement, Torts, §§ 606, 607; Gatley, Libel & Slander, pp. 344-356 (4th ed. 1953); Newell, Slander & Libel, § 485 (4th ed. 1924); Salmond, The Law of Torts, § 138 (11th ed. 1953); Green, The Right to Communicate, 35 N.Y.U. L. Rev. 903, 911 (1960); Hallen, Fair Comment, 8 Texas L. Rev. 41, 75 (1929); Harper, Privileged Defamation, 22 Va. L. Rev. 642, 660-662 (1936); Smith, Charges Against Candidates, 18 Mich. L. Rev. 1, 104 (1919); Veeder, Freedom of Public Discussion, 23 Harv. L. Rev. 413 (1910); Yankwich, The Protection of Newspaper Comment on Public Men and Public Matters, 11 La. L. Rev. 327, 339 (1951); Developments in the Law: Defamation, 69 Harv.

L. Rev. 875, 926 (1956); Note, 62 Harv. L. Rev. 1207, 1210 (1949). See also, Peter Walker & Son, Ltd. v. Hodgson [1909] 1 K.B. 239, 253.[18]

Moreover, it should be noted that fair comment can include language which is severe and denunciatory if related to the acts of the person and germane to the subject and circumstances involved. See Golden North Airways v. Tanana Publishing Company, supra, 9 Cir. 1954, 218 F. 2d 612, 626-629, and cases there cited; Beauharnis v. Pittsburgh Courier Publishing Co., 7 Cir. 1957, 243 F. 2d 705, 708; Caldwell v. Crowell-Collier Pub. Co., 5 Cir. 1947, 161 F. 2d 333, 336; Mick v. American Dental Ass'n., supra, 49 N.J. Super 262, 139 A. 2d 570, 580; Catalfo v. Shenton, 102 N.H. 47, 149 A. 2d 871, 873. See also, Boyer, Fair Comment, 15 Ohio St. L. J. 281, 293 (1954); Goodhart, Restatement of the Law of Torts, Vol. III: A Comparison Between American and English Law, 89 Pa. L. Rev. 265, 289 (1941); Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875, 880 (1949); comment, 12 Miami L. Rev. 89, 98 (1957); note, 62 Harv. L. Rev. 1207, 1215-1216 (1949). Cf. England v. Daily Gazette Company, 143 W. Va. 709, 104 S.E. 2d 306.

The erroneous charge, which was predicated on absolute liability upon any imputation of corrupt or dishonorable motives, was not rendered harmless by all or any other of the charges given by the court to the jury. All charges on the subject of fair comment, as well as the entire charge

[18] In some jurisdictions the privilege even is extended to the publication of false assertions of fact about official conduct of public officers if made in good faith and without malice. See, e.g., Howser v. Pearson, D.C. 1951, 95 F. Supp. 936; Charles Parker Company v. Silver City Crystal Co., 142 Conn. 605, 116 A. 2d 440 (1955); Clancy v. Daily News Corporation, 202 Minn. 1, 277 N.W. 264 (1938); Yancey v. Gillespie, 242 N.C. 227, 87 S.E. 2d 210 (1955); Bailey v. Charleston Mail Ass'n, 126 W. Va. 292, 27 S.E. 2d 837 (1943), 150 A.L.R. 348.

of the court have been examined. Included in the portion of the charge relating to fair comment, and preceding the charge here quoted, was one which also said that imputation of "corrupt and dishonorable motives" would be actionable, with no exception stated. Again, it was charged flatly that "comment going so far as to attack personal character or to impute immoral or corrupt motives is unfair and not privileged." Thus, the other charges relating to the defense of fair comment contained nothing to relieve the error but rather they compounded it.

Whether or not there were circumstances and facts truly stated such as to warrant the criticism which the publications contained, should have been made a question for the jury on a proper charge.

Third. This case demonstrates that a newspaper editorial, criticizing the conduct of a public official on a matter of public interest, which may have been justified and not libelous under the law when published, can be made to appear as an obvious and wanton libel under the terms and pronouncements of some judicial decision which may cast a different light on the matter dealt with, rendered afterward[91] and in a proceeding entirely collateral to the publisher and which in practical effect is ex parte. Therefore, what appears to have been overlooked in this case is that the use of the pronouncements of an appellate court made in such a subse-

[91] "'The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. * * *'

"The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. * * *" Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. ed. 2d 1498, 1509.

See also, Grosjean v. American Press Company, 297 U.S. 233, 56 S. Ct. 444, 80 L. ed. 660, 668.

quent proceeding, to assure liability and exact punitive damages[10] for a publication which may have been justified and proper when made, can be a means of intimidation and control of the press by judicial process,[11] in the face of the guarantee supplied by the Constitution of the United States against control. ~~of the press.~~ such For that reason, there is presented here a question which far transcends in importance the struggle of these parties over the money involved in this instance.[12]

That basis on which this case was tried, and the erroneous charge, each operated to strip from the defendant its shield of fair comment, and thereby to withhold from it freedom of speech and of the press, in violation of the First and Fourteenth Amendments[13] to the Constitution

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[10] The punitive damages included in the verdict can be attributed to introduction into evidence of the later Interim Report decision, as absence of personal malice was conceded. This is so because the jury was told, by the Interim Report case opinion, that the conduct of the state attorney, far from deserving the severe criticism which the publisher thought it merited, was proper and highly commendable.

[11] Judicial action is state action within the contemplation of the Fourteenth Amendment. See, e.g., Strauder v. West Virginia, 100 U.S. 303, 25 L. ed. 664; Ex parte Virginia, 100 U.S. 339, 25 L. ed. 676; Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. ed. 1161, 3 A.L.R. 2d 441; Barrows v. Jackson, 346 U.S. 249, 73 S. Ct. 1031, 97 L. ed. 1586.

[12] Thus a vital federal question emerges [Garland v. Torre, 2 Cir. 1958, 259 F. 2d 545, 548; Tribune Review Pub. Co. v. Thomas, W.D. Pa. 1954, 120 F. Supp. 362, 369] regarding the denial of defendant's privilege of critical fair comment. See Julian v. American Business Consultants, 2 N. Y. 2d 1, 155 N. Y. S. 2d 1, 10, 137 N. E. 2d 1; Hall, Preserving Liberty of the Press by the Defense of Privilege in Libel Actions, 26 Cal. L. Rev. 226 (1938). Cf. Beauharnais v. Illinois, 343 U.S. 250, 72 S. Ct. 725, 96 L. ed. 919.

[13] The Fourteenth Amendment restrains the state from denying freedom of the press. See, e.g., Lovell v. Griffin, 303 U.S. 444, 58 S. Ct. 666, 82 L. ed. 949; Smith v. California, 361 U.S. 147, 80 S. Ct. 215, 4 L. ed. 2d 205.

of the United States by denying, to defendant, due process of law.

[R.-S. Ct. 152]

IN THE SUPREME COURT OF FLORIDA

July Term, A. D. 1961

Monday, October 2, 1961

THE MIAMI HERALD PUBLISHING CO., a Florida corporation, *Petitioner,*

vs.

DOROTHY M. BRAUTIGAM, as Administratrix of the Estate of George A. Brautigam, Deceased, *Respondent.*

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Third District, in said cause bearing date March 9, 1961 (petition for rehearing denied March 23, 1961), and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy

TEST:

GUYTE P. MCCORD
Guyte P. McCord
Clerk Supreme Court.

[R.-S. Ct. 154]

IN THE SUPREME COURT OF FLORIDA

July Term, A. D. 1961

Monday, October 30, 1961

THE MIAMI HERALD PUBLISHING CO., a Florida corporation,
Petitioner,

vs.

DOROTHY M. BRAUTIGAM, as Administratrix of the Estate of George A. Brautigam, Deceased, *Respondent.*

The petitioner has filed a petition for a rehearing on reconsideration of the above cause; and the same having been duly considered, it is ordered that said petition be and the same is hereby denied.

A True Copy

TEST:

GUYTE P. McCORD
Guyte P. McCord
Clerk Supreme Court.

(Plaintiff's Exhibit 6)

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1957

En Banc

Case No. 28,461.

STATE OF FLORIDA, ex rel. GEORGE A. BRAUTIGAM, State Attorney, Eleventh Judicial Circuit of Florida, *Appellant*,

vs.

INTERIM REPORT OF GRAND JURY Recommending Resignation of Judges and Disbarment of Attorneys Implicated in the Dowling Estate Curators Case, Dated April 26, A. D. 1956 of the DADE COUNTY GRAND JURY, FALL TERM, 1955, *Appellee*.

Opinion Filed February 27, 1957

An Appeal from the Circuit Court for Dade County, Robert L. Floyd, Judge

George A. Brautigam, Paul A. Louis, Max B. Kogen, Thomas N. Balikes, William A. Meadows, Jr., and Donald G. McKenzie, for Appellant

Richard W. Ervin, Attorney General and Reeves Bowen, Assistant Attorney General, for Appellee

Per Curiam:

We here review the action of an assigned circuit judge in refusing to suppress portions of an interim report of the Dade County grand jury filed April 30, 1956, just eight days prior to the filing of its final report. The motion to suppress was made by the State Attorney, who was not named in the interim report nor consulted as to the propriety of its filing.

The portion of the interim report sought to be suppressed dealt with the actions and conduct of a circuit judge and three attorneys appointed by him in the handling of the

estate of an incompetent—two as curators and one as guardian ad litem. It might be noted that, although the allowance of fees and approval of the curators' administration by the trial judge involved the exercise of his judicial discretion, no interested party has complained, on appeal, that he abused his discretion. It is also noteworthy that one of the curators had, at the time of the investigation, been appointed a circuit judge and has since, in November 1956, been elected by the people to perform the duties of the office after a full public disclosure of the charges made in the report.

In addition to a factual account of the administration of the incompetent's estate, the report contained the jurors' own personal interpretation of the facts and their views as to the underlying motives of the principals in pursuing the course of conduct detailed in the report. Almost all of their remarks in this respect were derogatory and defamatory. The over-all tone of the report is exemplified by the following excerpt from their "summary":

"As the story unfolded it showed what happens to helpless old people who seek the protection of Judge ....'s Court 'against designing persons'—wanton disregard of the law, and the stripping of the estate of a helpless old man of vast sums of money."

The jurors concluded that "[i]n view of the disregard of the law, in view of the squandering of assets of an estate and the allowance of exorbitant fees, in view of the connivance of the Court and its appointees, and in view of conduct unbecoming Judges and members of the Dade County Bar," the circuit judges in question were "unfit to serve and should resign from office" and the lawyers in question were "unfit to practice law and to perform the functions of officers of the court." They called upon the Board of Governors of The Florida Bar and the Grievance Committee for the Eleventh Judicial Circuit of The Florida

Bar "to review the conduct of the participants in this case with a view to disciplinary action and disbarment."

The assigned judge was of the opinion that the investigation and report were authorized under the decisions of this court in In Re Report of Grand Jury, 152 Fla. 154, 11 So. 2d 316 (1943); Owens et al v. State et al., 59 So. 2d 254 (Fla. 1952); and Ryon v. Shaw, 77 So. 2d 455 (Fla. 1955), and declined to grant the State Attorney's motion to suppress the portion of the interim report in question. However, upon the motion of John Wright, the attorney named in the report who had been appointed guardian ad litem of the estate, the assigned judge expunged from the record the statement in the interim and final reports finding that Wright was "unfit to practice law and to perform the functions of an officer of the Court" on the ground that this conclusion was not supported by the factual allegations made therein. This order was appealed by the State and was consolidated for oral argument with the appeal in the instant case. See State ex rel. Stephenson v. Wright, opinion filed this day.

The ultimate question here is whether a grand jury may investigate the official conduct of a judge, and his appointees, of the court of which it is an arm and file a report of its investigation which is openly and frankly slanderous as to the court appointees and contemptuous as to the judge, see Coons v. State, 191 Ind. 580, 134 N.E. 194, without at the same time filing indictments against them. We have concluded that such a report goes far beyond any authority which, by judicial decision, has been conferred upon grand juries in this state.

This court is committed to the rule that a grand jury may investigate "every offense that affected the morals, health, sanitation, and general welfare of the county," as well as "county institutions, buildings, offices, and officers and . . . make due presentment concerning their physical, sanitary, and general condition." In re Report of Grand Jury,

supra, 11 So. 2d 316. They may make a "fair"-report of their findings, even though the report incidentally reflects negligence or incompetence on the part of the public official or officials responsible for undesirable "physical, sanitary, and general conditions" reported by them: Owens et al v. State et al., supra, 59 So. 2d 254, 256; Ryon v. Shaw, supra, 77 So. 2d 455.

But except for the decisions of a New York court in Matter of Jones, 92 N. Y. S. 275 (not followed in later New York decisions, see In re Wilcox, 276 N.Y.S. 117, 126), of the Supreme Court of New Jersey in In re Presentment by Camden County Grand Jury, 89 A. 2d 416 (N. J. 1952), and of a District Court of Appeal in California, Irwin v. Murphy, 129 Cal. App. 713, 19 P. 2d 292, 293 (a libel suit, not a motion to expunge), no authority has been found for grand juries to make reports of undesirable conditions found by them, if the report charges or casts reflection of misconduct or maladministration upon a public officer, unless the report is followed by an indictment of the officer. And it is held even by the New York and New Jersey courts that a grand jury is not authorized to elect to file a presentment rather than to find an indictment, if the misconduct of maladministration amounts to a crime for which an indictment may be had. See In re Jones, supra; Appeal of Messano, 106 A. 2d 537 (N. J. 1954).

The parties here are not in agreement as to whether the report in question discloses the commission of a crime by the principals. In the brief filed on behalf of the grand jury, it is stated that the report does not charge the principals with a crime because it does not allege that they willfully or corruptly performed or failed to perform their duties. But it at least convicted them—without indictment, without published evidence, without trial, and without due process of law—of wrongdoing little short of a crime, inevitably blacke[illegible]ng their reputations and destroying them in their profe[illegible]on. Such a conviction by a grand jury is not far removed from and is no less repugnant to tradi-

tions of fair play than lynch law. The medieval practice of subjecting a person suspected of crime to the rack and other forms of torture is universally condemned; and we see little difference in subjecting a person to the torture of public condemnation, loss of reputation, and blacklisting in their chosen profession, in the manner here attempted by the grand jury. The person so condemned is just as defenseless as the medieval prisoner and the victim of the lynch mob; the injury to him is just as fatal as if he had been charged with and convicted of a crime. As stated in People v. McCabe, 266 N. Y. S. 363, 367, a case frequently cited in denouncing grand jury reports such as that with which we are here concerned:

"A presentment [report] is a foul blow. It wins the importance of a judicial document; yet it lacks its principal attributes -- the right to answer and to appeal. It accuses, but furnished no forum for denial. No one knows upon what evidence the findings are based. An indictment may be challenged -- even defeated. The presentment is immune. It is like the 'hit and run' motorist. Before application can be made to suppress it, it is the subject of public gossip. The damage is done. The injury it may unjustly inflict may never be healed.".

The wisdom of the foregoing rule is demonstrated by the Grand Jury report in the John W. Wright case, decided this date. Wright was castigated, humiliated and embarrassed by a presentment just short of indictment, although the record and holding of the trial court showed him guilty of no wrongdoing. On the contrary, the Grand Jury presentment itself in one instance recognized the important service that Mr. Wright had rendered in preventing the entry of a substantial judgment against the estate of Mrs. Dowling.

For the future guidance of the grand juries of this state, we repeat the admonition of In re Report of Grand Jury, supra, 11 So. 2d 316, 318, that a grand jury "will not be

permitted to single out persons in Civil or official position to impugn their motives, or by word, imputation, or innuendo hold them to scorn or criticism. . . Neither will they be permitted to speak of the general qualification or moral fitness of one to hold an office or position. . . ." Our holding in this respect is in line with the great weight of authority in this country that "it is improper for a grand jury to present with words of censure and reprobation a public official or other person by name without presenting him for indictment and the accused has the right to apply to the court to have the objectionable matter expunged from the court records." Ex parte Faulkner et al., 251 S.W. 2d 822 (Ark. 1952), and cases cited. If in the course of their investigation of general public affairs they find that neglect or ineptitude is responsible for an undesirable condition, the public welfare dictates that they may make their report even though it incidentally points to an official or officials as responsible therefor. But, as stated in In re Report of Grand Jury, 260 P. 2d 521 (Utah 1953), "While much good can result from a grand jury calling attention to conditions which they find to be in need of remedying, when the report goes further and impugns the motives and conduct of public officials, the possibility of damaging the reputation of blameless public officials overshadows the good which might result to the public from the filing of such a report."

We have not overlooked the dictum in In re Report of Grand Jury, (Graves case), supra, 11 So. 2d 316, that "if the grand jury makes an investigation on its own initiative and reaches the conclusion that the circumstances warrant suspension rather than indictment or it may be both, it would be derelict in its duty if it did not bring the matter of suspension to the attention of the Governor." In that case, the public official in question had been indicted by a previous grand jury and the indictment called to the attention of the prosecuting officials by a subsequent grand jury; and it was against that background that this court

declined to expunge the report of a third grand jury recommending that he be removed from office by the Governor. It is noteworthy that in the Graves case, supra, the Grand Jury was further investigating *after indictment* a constable, who is an executive officer subject to suspension by the Governor as chief executive of the state; whereas, in this case the Grand Jury was investigating a circuit judge, vested with judicial and discretionary powers by our Constitution and subject to removal only by way of impeachment.

The line of demarcation between a legitimate grand jury report and one which unfairly castigates a public official, without filing an indictment, may be difficult to draw in any given case; but that is no reason for ignoring and failing to observe any line. If the report exceeds permissible limits, the assigned judge has the right to expunge the objectionable matter from the report in the exercise of "its inherent power to preserve the integrity of its records or to correct the action of one of its appendages where such action constitutes a violation of court rules or is in excess of its powers." Application of United Electrical, Radio & M. Workers, 111 F. Supp. 858 (S.D. N.Y. 1953).

From what has been said, it is clear that the grand jury, by the report in question, exceeded the permissible bounds set forth in In re Report of Grand Jury, supra, as quoted above as to all principals, assuming arguendo that the court appointees were public officials. In addition, it made a judicial inquisition into and report upon the manner in which a judge of the very court of which it is an appendage exercised his judicial discretion. If its investigation disclosed that such discretion was exercised willfully and corruptly, it was its duty to return an indictment against him. See Ex parte Amos, 93 Fla. 5, 112 So. 289. If no such criminal conduct was disclosed, it had no further jurisdiction in the matter.

In announcing the foregoing views we do not necessarily approve of the manner in which certain phases of the liti-

gation under investigation were handled; indeed, had some of the orders been brought here for review, it well may be that we would have entered judgments differing from those of the trial judge. The decisions made by the trial judge were, however, the exercise of a discretionary power vested in him by our organic law and from which no appeal was taken by the interested parties. It is not official misconduct for a judge to make a mistake when operating within the scope of the power vested in him by law.

In bringing this phase of the matter to a close we feel impelled to commend Honorable George Brautigam, the State Attorney for the Eleventh Judicial Circuit at the time of the presentment in question, for promptly asserting and advocating the rights of the general public in the principles of personal rights and freedom discussed and pronounced herein. His intervention for such purpose was made in the face of great obstacles and during a tornado of adverse public feeling that was generated by the improper presentment complained of. Unlike Pilate, he did not yield to what appeared at the moment to be the popular side of a controversy but performed his duty according to the dictates of his own conscience, as he had the right to do. Subsequent public events indicate he paid a high price for his devotion to duty. Such courageous public service is worthy of this commendation.

The order of the assigned circuit judge refusing to grant the motion to suppress filed by the State Attorney is reversed, with directions to expunge the offending matter from both the interim and final report of the grand jury.

It is so ordered.

TERRELL, C. J., HOBSON, ROBERTS, DREW, THORNAL and O'CONNELL, JJ., CONCUR

THOMAS, J., not participating because of illness

(Defendant's Exhibit B)

In The Supreme Court of Florida
June Term, A. D. 1942
En Banc

In re: Report of Grand Jury

Motion of Hardy C. Graves to Expunge From The Records of The Court The Socalled Report of The Grand Jury Filed October 29, A. D. 1941.

Opinion Filed January 4, 1943

An Appeal from the Circuit Court for Hillsborough County, Harry N. Sandler, Judge

Tillman & Henderson and Sam Bucklew, for Appellant

J. Rex Farrior, for Appellee

Terrell, J.

In October, 1941, the grand jury for Hillsborough County filed a report in the Circuit Court in which it made findings of fact and recommended to the Governor that Hardy C. Graves, a constable in District Three of said county be removed from office. Graves promptly moved to expunge the report from the record. His motion was overruled; hence this appeal.

Some question has been raised as to the regularity of this procedure but Section Four of the Declaration of Rights concludes that matter in favor of Graves. This appears to be the first instance of such a proceeding in this State but appellant cites numerous cases in which a similar proceeding was followed in other jurisdictions. Ex parte Robinson, 231 Ala. 503, 165 So. 582; In re Report of Grand Jury of Baltimore City, 152 Md. 616, 137 Atl. 370; In re Grand Jury Report, 204 Wis. 409, 235 N. W. 789, and many others.

Several questions are argued but they all charge error in denying the motion to expunge the Grand Jury Report.

The answer to this question turns on that of whether or not the report was within the compass of the Grand Jury's power as defined by law.

Summarized, the report finds from evidence taken that Graves (1) permitted gambling and gambling houses to be conducted within his district and made no attempt to prosecute the operators. (2) To assist him in the conduct of his office he appointed persons of questionable character, one of whom had a criminal record and others had unsavory connection with gambling establishments. (3) He used his official position to intimidate the operators of certain businesses and compel them to patronize businesses that he favored. (4) He employed unnecessary deputies and failed to pay them thereby causing them to resort to means that were questionable to supplement their income. That part of the report most seriously assailed is as follows:

> "We have unanimously elected to ask for the immediate removal of Constable Graves rather than for prosecution chiefly because we are interested in the proper operation of that office in the future rather than any punishment of the individual. Furthermore, we realize that the chances of conviction of a law enforcement officer for nonfeasance, misfeasance and malfeasance are small and every effort in this State, which has ever been heard of by any member of this Jury, has resulted only in expense and delay. We further recognize and submit that there are many acts of misconduct which warrant the removal of an officer for which he might not be prosecuted, much less convicted."

The defendant in error contends that this language was prompted by the fact that in April, 1938, Graves was indicted by a grand jury and had never been brought to trial, that eighteen months later a second grand jury called attention to the indictment and that the report complained

of was the third time the grand jury had been called on to investigate Graves' official conduct. It appears that the third investigation was made at the request of the Governor, who called Graves before him, gave him a hearing, and suspended him, the hearing and suspension having taken place prior to the time the motion was made to expunge the report.

Trial by jury is by general consent a common law creation and does not prevail in countries which adopted the civil law though there are evidences of such an institution in Greece and Normandy long before it was adopted in England. The jury system was developed in England to aid the court in arriving at the factual truth of the controversy through which our law of evidence was derived. The same jury was at first the accuser and trier of the facts; it was the successor to the early more or less barbarous systems of trial by Corsned, Conjuration, Inquest, Wager, and Ordeal, all of which were predicated on the theory that God would miraculously intervene to save the innocent. All the early cases speak of twelve as composing the jury because as Lord Coke said, the law delighteth in the number twelve and that it is much respected in holy writ, as twelve apostles, twelve stones, twelve tribes, etc.

Few legal institutions have experienced a more remarkable evolution than the jury system. For a long time there was no distinction between the grand and petit or trial jury, though the former seems to have antedated the latter and is one of our most ancient institutions. The grand jury as we understand it took shape under Edward the third, about A. D. 1368, though its use in some form had been employed at a much earlier date. It took its name from the fact that it was taken from the county at large in contrast to one taken from the hundred. The petit jury is said to have been carried to England by the Normans where it had been employed for a long time. The grand

jury was at first an instrument of the crown but in the process of its evolution, it became an independent instrument whose function was to uphold the liberty of the people and act as a buffer between them and the crown.

At the time the grand jury was incorporated into the law of this country, it had become strictly an inquisitorial body and except in special cases provided by the Constitution, no one could be tried for felony except he be previously indicted by a grand jury. Its function now depends on the law of the particular forum, some states being much broader than others. In Florida, the grand jury system was derived from the common law, Cotton vs. State, 85 Fla. 197, 95 So. 668, but has been enlarged by statute.

Section 95 of the Criminal Procedure Act defines its duties as to crimes and is as follows:

> "The Grand jurors shall inquire into every offense triable within the county for which any person has been held to answer, if an indictment has not been found or an information filed for such offense, and all other indictable offenses triable within the county which are presented to them by the prosecuting attorney or otherwise come to their knowledge."

When selected as provided by Section Eighty of the Criminal Procedure Act, they are required to take the oath prescribed by Section 89, as follows:

> "You, as grand jurors for the body of this county of ..... do solemnly swear (or affirm, as the case may be) that you will diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge; the counsel of the State of Florida, your fellows and your own, you shall keep secret, unless required to disclose the same by some competent court; you shall present no man for envy, hatred, or malice, neither shall you leave any man

unpresented for love, fear, favor, affection, reward, or hope thereof, but you shall present things truly as they come to your knowledge, according to the best of your understanding. So help you God."

After the oath is administered, the court is required to "charge them concerning their duties". Section 8215, Compiled General Laws of 1927, provides that the grand jury "may present every offense against the penal laws of this State whether any specific punishment is pointed out or not". Other provisions extend their powers and duties but they are not pertinent to this case.

The oath as here quoted was in substance the same oath that was administered to the jury in the time of Bracton and the statutes limiting their power were in the main the common law of that period. The charge "concerning their duties" must of course be encompassed within the oath and the statutes but it is well known that by their charges trial courts have directed the grand jury to investigate every offense that affected the morals, health, sanitation, and general welfare of the county. The charge also goes to the investigation of county institutions, buildings, offices, and officers and directs them to make due presentment concerning their physical, sanitary, and general condition. The grand jury is in other words the guardian of all that is comprehended in the police power of the State. To "inquire of all such matters and things as shall be given you in charge" and "present every offense against the penal laws of the State whether any specific punishment is pointed out or not" warrants this.

This interpretation clothes the grand jury with broad inquisitorial power but no broader than judges have construed them to have since the law was promulgated. It would be a strange anomaly to hold that their power to indict or to recommend did not comport with their power to investigate. There are some things however that are

not within the category of grand jury powers. They will not be permitted to single out persons in civil or official position to impugn their motives, or by word, imputation, or innuendo hold them to scorn or criticism. Their investigation must be directed to detecting unlawful offenses; they will not be permitted to become the tool of blocs and groups to pry into personal affairs or to oppress some one. Neither will they be permitted to speak of the general qualification or moral fitness of one to hold an office or position but whether or not a county office is being conducted according to law and good morals is at all times within the jurisdiction of the grand jury to investigate. When they find that the law has been violated, it is their duty to indict but when they find charges made to be without foundation, it is as much their duty to exonorate as it is to indict in the first instance. It is by dispatching in a fair and impartial way matters brought to their attention that the grand jury becomes the buffer between the free citizen and arbitrary power.

We do not find that the grand jury report brought in question violates this rule except as to certain portions of the part quoted. It does not assail the character or qualifications or assault the motives of Mr. Graves. It does not hold him up to scorn or ridicule but deals exclusively with his conduct as a county official and that on the basis of evidence taken. All that part of the report quoted beginning with the word "Furthermore" on the fifth line and ending with the word "convicted" on the last line is improper, has no place in the report and is regarded as stricken.

The holder of public office in this country is clothed with a limited degree of sovereignty; in other words an attribute inherent in the people is transferred to one of its citizens to be exercised according to the terms of the trust imposing it and not as he would a chattel or a business that he acquires by outright purchase. Both the office and the conduct of the holder are public property that may be

withdrawn at any time the trust vesting it is abused. In a democracy, it is not possible for the people individually to know when such trusts are being abused so one of the agencies provided to represent and report when abuses are committed is the grand jury. It is a means whereby the people participate directly in the administration of their business and aids to a knowledge of why the grand jury has become such an important agency among free peoples. It could never attain such an important status in the totalitarian state.

But appellant contends that the action of the grand jury in this case deprives him of the right to be heard in his defense, the right to face his accusers and to answer the charge against him. The answer to this question is that grand jury investigations are always ex parte and the person investigated is never accorded the right to be heard before them. If he is indicted, he is accorded the right to be heard before the trial court. In this case it appears that the official conduct of appellant was investigated at the request of the Governor and when completed, the grand jury reached the conclusion that suspension from office was more consonant with the gravity of the offense than indictment and so recommended.

The Governor is the executive officer of the State and is required to enforce the law. He is authorized to suspend certain state and county officers for "malfeasance or misfeasance or neglect of duty in office, for the commission of any felony, or for drunkenness or incompetency". He may or may not accord them a hearing before suspension. If he elects to employ a grand jury investigation to aid him in his judgment, he certainly has a right to do so. In fact we know of no better source for aid that he could resort to. The grand jury is of the people and for the people; they have preserved it in the Constitution, Section 10, Declaration of Rights, and Section 28, Article Five. It is one of the means provided for the people to participate in popular

government and its primary function is to preserve personal and property rights. On the other hand if the grand jury makes an investigation on its own initiative and reaches the conclusion that the circumstances warrant suspension rather than indictment or it may be both, it would be derelict in its duty if it did not bring the matter of suspension to the attention of the Governor. To hold that such a finding should be squelched or that they should keep silent about it would be contrary to its purpose and would give the green light to crime and official depravity.

Every person who assumes the duties of public office does so with the knowledge that his official conduct is constantly under scrutiny by the public. For the purpose of detecting abuses of the trust so imposed, the law has erected what may be termed a three way switch, one of which leads to the Governor's office, one to the grand jury room, and one to the primary. Rectitude of official conduct is the only refuge from a plethora of light from these sources. At any rate, it is idle for one to think that he can administer the affairs of his office with one strabismic eye on the grand jury and the Governor and the other in pursuit of a course of conduct contrary to public morals. Public office is the most important trust democratic government vests in the citizen. It is important because the integrity level of the political unit rises and falls with that of its official leadership. The honest officer is not averse to having the light turned on and if he objects, there arises a shadow of suspicion that may prompt a grand jury inquisition.

We do not overlook appellant's contention that his procedure substitutes grand jury rule for the orderly processes of the law. Neither do we overlook the fact that the record in this case shows that he did not raise this contention until after the grand jury called "strike" on him three times and the Governor called "out". The Constitution attaches significance to the action of the grand jury and as to that

of the Governor it had the effect of transferring jurisdiction of the cause to the Senate. The evidence taken and on which the Governor acted is not before us but if it was, it would be improper for us to review it since that will be a matter for the Senate at its next session.

We do not find that the grand jury exceeded its jurisdiction; so the judgment appealed from is without error and is affirmed.

Affirmed.

Whitfield, J. concurs
Chapman and Thomas, JJ., concur specially
Brown, C.J., concurs in conclusion
Buford and Adams, JJ., dissent

CHAPMAN, J., concurring specially.

The practice has come into existence for grand juries to investigate, make inquiry, hear testimony, and make reports, without apparent statutory authority, on matters affecting the public interest and general welfare. When such activities are in good faith made and limited to the channel of the public interest and general welfare as differentiated from investigations prompted by private interests or arbitrary motives, then such written presentation should be sustained. The tremendous power by law conferred upon a grand jury, should not under any condition or circumstances become a vehicle of oppression or the instrumentality whereby the group in control should by their action through the grand jury promote private interests contrary to the interest of the public and general welfare. In the absence of a statute controlling the subject, I have concluded that it has not been made to appear that the challenged report is inimical to the public interest and general welfare and for this reason I concur in the majority opinion and judgment of Mr. Justice Terrell.

THOMAS, J., concurring specially.

It is my opinion that the case is not properly before this court but a majority of the court having a contrary view I concur in the opinion of Mr. Justice Terrell.

Buford, J., dissenting:

I am unable to concur in the opinion prepared for the Court in this case by Mr. Justice Terrell.

From a study of the three cases cited in support of the procedure here adopted in invoking the jurisdiction of this Court, I find that not only was the procedure approved in those cases but in all three cases the extra judicial report of the grand jury was ordered expunged. In the case of Ex Parte Robinson, 231 Ala. 503, 165 Sou. 582, the Court said:

"On the other hand, where the question has arisen on direct attack, as here, with one accord, the cases hold that the officer when he is thus criticized has the right in such a proceeding as this to have the report expunged. In one case it is thus expressed: 'While it may be observed that the court has tolerated, rather than sanctioned, such presentment of things general, yet the grand jury should never, under cover of a presentment, present an individual in this manner for, if it have legal evidence of the commission of the crime, it should find an indictment against him upon which he could be held to answer, and, if it have no such evidence, it ought, in fairness, to be silent.' In re Gardiner, 31 Misc. 364, 64 N.Y.S. 760, 762. This is quoted in Re Wilcox, 153 Misc. 761, 276 N.Y.S. 117, at page 125, with quotations to a like effect from many other cases. It was also said: 'It cannot be that it was ever contemplated that this body created for the protection of the citizen was to have the power to set up its own standards of public or private morals, and to arraign citizens at the bar of public opinion, without responsibility for its abuse of that power, and without giving to the citizen the right to a trial upon the accusations.' All this in respect to public officers. The

dissenting opinion to the same effect in Jones v. People, 101 App. Div. 55, 92 N.Y.S. 275, has been approved in the later cases decided by that court. In re Osborne, 68 Misc. 597, 125 N.Y.S. 313, 318, it is said: 'So long as they are confined to matters of general interest they are regarded as harmless, even though a waste of time and effort, and after the ephemeral motive of the day has passed they are allowed a peaceful rest. But it is very different when the motives and conduct of the individual are impugned, and he held to reprobation, without an opportunity to defend or protect his name and reputation.' The motion was by a district attorney. And, likewise, such a motion was sustained in many cases by officers thus criticized -- In re Heffernan (Co. Ct.) 125 N.Y.S. 737, In re Woodbury (Sup.) 155 N.Y.S. 851, In re Crosby, 126 Misc. 250, 213 N.Y.S. 86, and in People v. McCabe, 148 Misc. 330, 266 N.Y.S. 363, 367, where it is said in part: 'An indictment may be challenged -- even defeated. The presentment is immune. It is like the 'hit and run' motorist. Before application can be made to suppress it, it is the subject of public gossip. The damage is done. The injury it may unjustly inflict may never be healed.' Also In re Funston, 133 Misc. 620, 233 N.Y.S. 81; State v. Bramlett, 166 S.C. 323, 164 S.E. 873, 875. In the latter case the court observed: 'But a grand jury transcends its powers and exceeds its duty when in its presentment * * * * it presents an officer or person by name, and with words of censure and reprobation, without presenting him for indictment.'

A vast number of cases are to the same effect. In re Grand Jury Report, 204 Wis. 409, 235 N.W. 789; In re Report of Grand Jury, 152 Md. 616, 137 A. 370. In this case there is a review of the cases cited above, and many others approved the principle. Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200, 150 N.W. 141, Ann. Cas. 1916E. 223, 28 Corpus Juris 799, and many textwriters are quoted to the same effect in the Wilcox case, supra."

Each and every of the cases cited by the Supreme Court of Alabama, supra, support the enunciation of that Court. I have not found, nor have I been cited, any case in point in this Country where the contrary was held. See 28 C.J. 799, Sec. 91; 24 Am. Jur. p. 859, Sec. 36, and cases there cited.

In my humble opinion the unlawful action of the Grand jury in this regard is not made tenable because of the fact that there is some inference in the record to the effect that the Grand Jury was directed by the Governor to make investigation of Graves. This is true because the grand jury is a component part of the judicial system of our State and the Governor as the Chief Administrative Officer has no power or authority to direct the grand jury in the exercise of its functions. Article II of our Constitution provides:

"The powers of the government of the State of Florida shall be divided into three departments: Legislative, Executive and Judicial; and no person properly belonging to one of the departments shall exercise any powers appertaining to either of the others, except in cases expressly provided for by this Constitution."

Likewise, it was not within the legal power, duties or functions of the grand jury to advise the Governor as to what, if any, action he should take in regard to any of his executive or administrative duties.

It, therefore, follows that this recommendation of the grand jury was without authority of law, was of no force and effect, was in no way binding upon the Governor and violated Article II of the Constitution, supra. It is also violative of the due process clause of both the Federal and State Constitution because its purpose was to deprive Graves of his office by a method and means wherein he was not vouch-safed by law of any opportunity to be heard in his own defense. The mere fact that the Governor might have granted Graves a hearing on the charges contained in

the Report does not satisfy the due process provisions of our Constitution, because if the Governor did grant such a hearing it was a matter of grace and not a matter of right.

If either the first or the third charge as summarized in Mr. Justice Terrell's opinion were true, then Graves was guilty of a criminal offense for which he could have been indicted, or informed against, and could have been tried by a jury under the rights guaranteed to him by the Constitution.

On the other hand, if he was only guilty of that conduct which is summarized in charges 2 and 4, proof of the allegations of those charges would hardly be sufficient to constitute grounds for suspension from office.

It appears to be the theory, upon which all the cases hereinbefore referred to were decided, that it is beyond the province of a grand jury to present an officer or other person by name and with words of censure and reprobation, without presenting him for indictment, because to do so is to besmirch and hold to reprobation the accused without opportunity to defend or protect his name and reputation.

ADAMS, J., concurs
CHAPMAN, J., dissents

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IN THE

Supreme Court of the United States

October Term, 1961

No. 681

THE MIAMI HERALD PUBLISHING CO.,
a Florida Corporation,

Petitioner,

v.

DOROTHY M. BRAUTIGAM, as Administratrix of the Estate of George A. Brautigam, Deceased

Respondent.

On Petition For Writ of Certiorari To the District Court of Appeal of Florida, Third District

---

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

The following abbreviations will be used:

R — Record
PC — Petition for Certiorari
PA — Petitioner's Appendix
RA — Respondent's Appendix

OBJECTIONS TO JURISDICTION

Aware that to invoke certiorari jurisdiction it must establish that the controlling issue in the State Court was a federal issue, the Herald has conjured up a Petition alleging the violation of the First and Fourteenth Amendments to the Constitution of the United States. A cursory review of the record discloses that Petitioner pays mere lip service to this jurisdictional requirement. The Herald attempted to raise a federal question at the outset by invoking the protection of Federal Amendment One in its Answer (R 7-35, 66-67). Neither in its Answer nor at any time prior to lodging its appeal did petitioner invoke the protection of the Fourteenth Amendment.[1] Reference to the Fourteenth Amendment appears first in petitioner's Assignments of Error — at a time when the Trial Court was divested of jurisdiction (R 858-859).

The absorption of Amendment One into the Fourteenth Amendment casually commenced with **Gitlow v. New York**[2] and has become accepted doctrine with subsequent decisions.[3]

As recently as **Smith v. California**,[4] Justice Black, concurring, stated:

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[1] No reference was made to the Fourteenth Amendment in its Motion for Directed Verdict (T. 728), nor its Motion of Judgment in accordance with Motion for Directed Verdict or for New Trial (R. 101-105).

[2] 268 U.S. 652 (1925).

[3] Fiske v. Kansas, 274 U.S. 380 (1927); Near v. Minnesota, 283 U.S. 697 (1931); DeJorge v. Oregon, 299 U.S. 353 (1937); Cantwell v. Connecticut, 310 U.S. 296 (1940). Cf. Beauharnais v. Illinois, 343 U.S. 250 (1952) Jackson, J., dissenting 287-305. See also Roth v. United States, 354 U.S. 476 (1957).

[4] 361 U.S. 147 (1959).

> " . . . State intrusion or abridgment of freedom of speech and press raises a different question, since the First Amendment by its terms refers only to laws passed by Congress. But I adhere to our prior decisions holding that the Fourteenth Amendment made the First applicable to the States. See cases collected in the concurring opinion in Speiser v. Randall, 357 U.S. 513, 530, 2 L.Ed. 2d 1460, 1475, 78 S.Ct. 1332 . . . "

There is no authority for the converse proposition that the Fourteenth Amendment is absorbed into the First. Research fails to reveal any authority to uphold the Herald's position that by invoking the protection of only the First Amendment, it had with sufficient precision properly raised and preserved the safeguards of the Fourteenth Amendment.

Faced with a $100,000 judgment and knowing that Article V, Section 4(2) of the Florida Constitution provides:

> Appeals from Trial Courts as a matter of right may be taken directly to the Supreme Court . . . from Final Judgments . . . construing a controlling provision of the Florida or Federal Constitution

the Herald sought review in the local District Court of Appeal, Third District, rather than take direct appeal to the Florida Supreme Court. Petitioner did not then allege, as it does now, that "*important and unsettled questions*" concerning constitutional provisions should be settled (PC 18).

The Herald, through its President and Publisher, first disparaged the Florida Supreme Court to the jury, then manifested its intention to seek ultimate review in the Supreme Court of the United States should it lose in the Florida Courts.[5] (R. 437-438). Desiring to expedite litigation pending since 1957, respondent petitioned for transfer to the Florida Supreme Court, citing Mr. Knight's testimony and Point V of the Herald's Brief on Appeal which argued constitutional provisions. (R. 867)

The District Court transferred the cause to the Florida Supreme Court (R. 881, PA 1A). After hearing two oral arguments the Florida Supreme Court, citing **Beauharnais v. Illinois,**[6] and **Layne v. Tribune Co.** (Fla. 1933,[7] retransferred to the District Court, holding "the trial court did not construe a controlling provision of the Florida or Federal Constitution."[8] (PA. 3a)

We recognize that if properly raised, the misapplication rather than misconstruction of a controlling constitutional provision could justify certiorari. In reviewing the Herald's appellate strategy we seek to establish that it has suddenly adopted a position heretofore avoided

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[5]R. 437: "I don't think many of us look to the Florida Supreme Court as the last opinion in legal matters."

R. 438: "Q. Do I understand that you as editor of this paper don't feel that the Florida Supreme Court has the last word with reference to matters such as Florida Grand Jury, the function of the courts in Florida, what may or may not be defamation, or what may or may not be retraction?

A. I am referring to the situation that I mentioned before.

Q. I am referring to this case here, sir?

A. Well, we'll see where this leads."

[6]343 U.S. 250 (1951).

[7]146 So. 235, 238 (Fla. 1933).

[8]Miami Herald Publishing Company v. Brautigam, 121 So. 2d 431, 432 (Fla. 1960).

by its present contention that "important and unsettled" constitutional questions should be settled. (PC 18)

We respectfully submit: First, that no substantial federal question is involved herein.

In **Beauharnais v. Illinois** this Court stated:

> ". . . Today, every American jurisdiction—the forty-eight States, the District of Columbia, Alaska, Hawaii and Puerto Rico—punish libels directed at individuals. 'There are certain well-defined and narrowly limited class of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words— those which by their very utterance inflict injury or tend to incite to an immediate breach of the peace. . . . Such were the views of a unanimous Court in Chaplinsky v. New Hampshire, supra."[10]

Second, the federal question had not been properly raised in the State Courts. The trial court was never afforded the opportunity to consider and decide the applicability of the Fourteenth Amendment since that constitutional provision was not invoked prior to appeal.

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[9]343 U.S. 250, 255 (1951). In Mr. Justice Jackson's dissent is contained a lengthy discussion of this point.

[10]315 U. S. at 571, 572. *Chaplinsky* is also cited in the opinion now sought to be reviewed at 127 So. 2d, page 322. See also Near v. Minnesota, 283 U.S. 697 (1931).

Third, assuming arguendo a substantial federal question was invoked in the judgment sought to be reviewed, and had been properly raised, still this Court should not grant certiorari because the judgment can be sustained on independent grounds of Florida law. In a defamation action, there is no defense to a libel published with actual malice.[11]

QUESTIONS PRESENTED*

1. Whether the editorials constitute fair comment as a matter of law?

2. Did the jury finding of actual malice vitiate the defense of fair comment?

3. Whether the petitioner's rights as guaranteed by the First and Fourteenth Amendments of the United States Constitution were violated

a) by the admission into evidence of the judicial opinion which the trial court termed "relevant";

b) by the court's charge to the jury that if the editorials were not free from imputations of dishonorable or corrupt motives, the defendant exceeded the bounds of fair com-

[11]The only exception is in the case of absolute privilege not involved herein.

*Assuming arguendo that (i) petitioner's federal question is substantial; (ii) that it was properly raised in the Florida court; and (iii) that there is no independent State ground on which the instant decision can rest, the issues then presented to this Court by the Herald's petition are as stated herein.

ment without further charging as to the right to make such imputations when reasonably inferred from facts truly stated?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions set out in Petition for Certiorari, the instant case also involves Section 4 of the Declaration of Rights, Florida Constitution: (RA 1)

> SECTION 4. Courts open to everyone; remedy for wrongs. — All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay.

Not directly involved but relevant are the following constitutional and statutory provisions:

Article V, Section 4(2) of the Florida Constitution which sets forth the jurisdiction of the Florida Supreme Court:

Article IV, Section 15, of the Florida Constitution Removal or Suspension of Officers. (RA 1)

Florida Statutes 1955:

Section 770.01 — Notice condition precedent to action or prosecution for libel. (RA 2).

Section 770.02 — Correction, apology, or retraction by newspaper. (RA 3)

Section 905.19 — Duty of prosecuting attorney. (RA 3)

Section 925.01 — Penalty for failure to perform duty required of officer. (RA 4)

STATEMENT OF THE CASE

Petitioner's version of the facts contains material omissions.

Prior to 28 April 1956 George A. Brautigam, the State Attorney, now deceased, enjoyed an unblemished reputation for being an honest, capable public official (R. 477, 634, 639, 651, 658, 667, 674, 686, 693, 703, 709, 714, 719). After said date he was regarded by the public with distrust, contempt, ridicule and hatred. He and his family were personally avoided. He was injured in his office and profession. (R. 245 et seq.) The two editorials published by the Herald, forming the basis of this suit, wrought the instant change. (R. 641-45, 687-90, 695, 700, 710-12, 720). Defendant supported plaintiff in his successful campaign for State Attorney in 1952 and thereafter remained friendly toward him until he moved to suppress the Interim Report of the Grand Jury. (Ex. A) (R. 419, 469-470). After that event, as a result of the publications in defendant's newspaper, (Ex. 1-15), public confidence in Brautigam was destroyed.

The Herald also supported Circuit Judge George E. Holt in his 1952 campaign for reelection. Shortly there-

after the Herald became "increasingly conscious" of Judge Holt's shortcomings (R. 581).[2] In December of 1955 Judge Holt was involved in a notorious automobile accident (Ex. 10, R. 587). At that point the Herald came to the conclusion that the Judge had outlived his usefulness and that he should step down—either voluntarily or otherwise (R. 607-608). The Grand jury publicly sent a delegation to witness the trial of Judge Holt. (Ex. 10). Alice Ward, an employee of the Herald and also a member of that same Grand Jury, is the wife of the man in charge of that department of the Herald which puts all stories in final form and drafts headlines—Herald "News Editor" Charles Ward (R. 395, 396, 517, 580). Shortly after the Holt trial, State Attorney Brautigam was requested by the Grand Jury to appoint Attorney S. D. Weissbuch to aid them in a particular investigation (R. 197). In response to plaintiff's inquiries, Weissbuch falsely stated that he knew none of the parties or the subject matter of the investigations when, in fact, he had just previously appeared before the Grand Jury as a witness (R. 256-58). Weissbuch was publicly accused without contradiction of having nursed a personal hatred for Judge Holt, and that he had avowed to "get even with him" (Ex. 15). Pursuant to Sec. 27.18 Florida Statutes (A. 3) upon the recommendation of Brautigam, Weissbuch was appointed an assistant to the State Attorney (R. 200). (Defendant's Ex. 1). When Brautigam observed that Weissbuch was conducting the investigation contrary to ethics and law,

[2] It is of more than passing interest or even irony that the editor whose article pen provoked the famous Pennekamp v. State of Florida case, 328 U.S. 331 is the same John Pennekamp who drafted the editorials which are the subject of this suit. It is noteworthy and of tremendous significance that the Judge Holt referred to in *Pennekamp*, id. at 337 fn 4, is the same Judge Holt whose notorious automobile accident while fleeing from the police actuated the Grand Jury investigation culminating in the illegal Grand Jury report.

he admonished him in the presence of the Grand Jury (R. 201). The Grand Jury sided with Weissbuch and Brautigam was "told to get out and stay out" (R. 201). Shortly before the Interim Report was to be filed, Grand Juror and Herald employee, Alice Ward, twice sent word to the Herald's Managing Editor, George Beebe, to hold front page space (R. 517).

Brautigam was then engaged in a campaign for reelection to be held on 8 May 1956 (R. 225). Having been a "satisfactory state attorney", (R. 592) the Herald was going to support him for reelection (R. 565).

On 26 April 1956 the Grand Jury, in the presence of Judge Floyd, gave Brautigam a copy of the Interim Report to examine (R. 204). Explaining why he considered the report illegal, Brautigam offered to redraft the document in accordance with law (R. 204). He was again asked to leave (R. 204).

Later that day, Brautigam was advised that the Grand Jury was going to file the Report and his presence was requested (R. 205). He was handed a copy of the same Interim Report of which only the last page had been changed (R. 205). Brautigam requested that the court withhold filing of the report until he had the opportunity to file a motion stating why the report was invalid and should not become part of the public records. The court granted his request and set time for argument at 2:00 P.M. Monday, 30 April 1956 (R. 205-206).

John Pennekamp, the Herald's editor, and other members of its staff were well aware that the contents of the Report concerned Judges Holt and Prunty and several

members of the bar, even though it was officially still secret (R. 528, 543). Brautigam's action touched off a chain reaction by defendant towards him which from that moment was to plague and harass him almost to the day of his death (Exhibits 1-15).

On Friday, 27 April, the Herald published a front page double banner headline devoting three columns to petitioner's action (Exhibit 2):

BRAUTIGAM BLOCKS GRAND JURY REPORT;
PANELISTS WARNED ON PHONE TO LAY OFF

AT LEAST FIVE TOLD TO 'BEWARE'
"Someone Knew" About 'Hot' Blast

By Ronald York
Herald Staff Writer

ATTORNEY ENTERS BID TO SUPPRESS IN CIRCUIT COURT

By J. L. (Dixie) Smith,
James Miller and
Lawrence Thompson
Herald Staff Writers

Plaintiff's picture appeared on the same page over the captain and headlines:

GEORGE A. BRAUTIGAM . . . holds up report.

Ronald York, who wrote the "Beware" story believed that fellow employee, Luther Voltz, had advised him to contact Grand Juror Mrs. Livesay, the source of the sinister story (R. 394). York admitted having previously stated "I knew Alice Ward was a grand juror and I have talked off the record with her many times." (R. 442)

Friday, 27 April 1956, Brautigam filed his Motion to

Suppress, setting forth with particularity the reasons why the Report was legally insufficient (Ex. 1) It also stated that neither Brautigam nor any members of his staff were involved A copy of said motion was distributed to all news media, including Dixie Smith, the Herald's Court House Reporter (R. 330). Dixie Smith testified that despite the fact that he had reported that neither Brautigam nor any of his assistants were involved in the Interim Report, that part had been deleted from his story that was published on the front page of the Herald on Saturday, 28 April (R. 332-333) (Ex. 3). Instead, in that same edition, a picture of Brautigam handing his Motion to Judge Floyd was published with the caption and story: "Wearing a Worried Look, State Atty. George A. Brautigam stands by while Circuit Judge Robert Floyd reads Brautigam's motion to suppress the Grand Jury report Friday . . . " (Ex. 3 p. 5B).

In the middle of the Dixie Smith story there appeared a prominently displayed cross reference (R. 580, 583), "Why Does State Attorney Muzzle the Grand Jury? See editorial on Page 6A" (Ex. 3). On Page 6A a cartoon entitled "WHY, GEORGE?" appeared depicting Brautigam holding a gag across the mouth of the Grand Jury (Ex. 3). Conspicuous because of its unusual format, (R. 447, 597) appeared the first editorial upon which this suit is based. (Ex. 3)

On that Saturday, 28 April, Brautigam, in the company of some of his assistants, visited defendant corporation and held a conference with Managing Editor Beebe, and Reporters Voltz and Collier (R. 224 et seq.; 478 et seq; 367 et seq; 631 et seq). Brautigam voiced his objections to the unfair manner in which his actions were

being reported and particularly objected to the editorial and cartoon. Excerpts from the majority opinion in **In Re Report of Grand Jury**, 14 So.2d 316 (Fla. 1943), (hereinafter referred to as the **Grave's Case**) were read to Editor Beebe to convince him that the newspapers were in error when they stated that his Motion to Suppress (Ex. 1) was based upon a dissenting opinion (R. 226-227, 632, 633). Brautigam offered to pay the regular advertising rate to have his Motion published so that the public might know his side of the story (R. 226, 632). Brautigam (R. 227) and former assistant (R. 632) testified, in contradiction of Beebe (R. 527), that Beebe had promised to publish Brautigam's Motion in full, without cost.

On the front page of the Sunday Herald, 29 April 1956, appeared the false headline (Ex. 4 R. 364):

"DIGS UP '43 INCIDENT

High Court Upset Case Brautigam Cited"

On the witness stand, Beebe admitted the falsity of the headline (R. 364-365). Late Sunday evening, Brautigam read the early morning, Monday, 30 April, edition of the Herald (R. 239). The Herald had failed to publish his motion. On the front page appeared an unfavorable story by Ronald York which, among other things, in bold type stated that Brautigam's Motion was based upon a dissenting opinion.

On page 6A appeared the second editorial upon which the Complaint was based (Ex. 5, PC 11). On that same Sunday evening, Brautigam immediately sent a telegram to the Herald in care of Managing Editor Beebe remind-

ing him that he had relied upon his promise to publish the Motion. He demanded fair treatment and a retraction. (Ex. 7, R. 239).

York testified that he did not know, in fact, whether Brautigam had actually relied upon a dissenting opinion but that he had been instructed by one of his superiors to write the type of story that appeared (R. 409).

On Monday, 30 April Brautigam's Motion was heard in open court; it was denied, and the report was spread upon the minutes (R. 230-231).

On 3 May 1956, buried on page 10B, the Herald published an abridged account of Brautigam's position as set forth in his Motion (Ex. K). The Miami Herald endorsed Brautigam's opponent, Richard E. Gerstein (R. 425, 469-70). On Tuesday, 8 May, Brautigam was defeated for reelection (R. 225). Plaintiff appealed the order of Circuit Judge Floyd (R. 231). On 27 December, just as plaintiff was about to leave office, the "Tipoff" column of the Herald falsely reported that plaintiff . . . "may drop law business altogether and join an insurance firm" (Ex. 14).

On 27 February 1957, the Supreme Court reversed Circuit Judge Floyd and expunged the Interim Report. **State v. Interim Report of Grand Jury**, 93 So.2d 99 (Fla. 1957) (Ex. 6). On 28 February 1957 the Herald reported the Supreme Court decision as a victory for Judge Holt (Ex. 11) and published a critical editorial regarding the Supreme Court opinion (Ex. 12).

On 18 October 1957 the Herald carried a front page headline story that Richard Gerstein, Brautigam's suc-

cessor, had been severely criticized by a subsequent Grand Jury. Again Brautigam was in no way involved; on the front page below a picture of Gerstein appeared a picture of the plaintiff with the false caption: "George Brautigam . . . jury target before." (Ex. 8) The editors of the Herald admitted that they knew that this was not true, but refused to correct the false statement (R. 356, et seq. 569).

On 14 February 1958 the jury awarded plaintiff $25,000.00 compensatory damages and $75,000.00 punitive damages (R. 854). George Brautigam died on 17 August 1958.

REASONS FOR DENYING THE WRIT

1. **Jurisdiction to this court will not lie because there is no substantial federal question.** See Objections to Jurisdiction, supra, p. 2-6.

2. **The editorials did not constitute fair comment as a matter of law.**

As a matter of law, the editorials exceeded the bounds of fair comment.[13] Filing no Motion to Dismiss, the Herald conceded the publications were libelous per se. Petitioner has yet to contend that the editorials were not defamatory. Not only did the editorials impugn Brautigam's motives and hold him up to scorn, ridicule and contempt, but they actually charged him with a crime for which he could have been removed from office,[14] fined and imprisoned.[15]

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[13] See argument under Point 4(b) infra, p. 25-29.

[14] Sec. 15, Art. IV, Fla. Const., RA 1-2.

[15] Sec. 925.01 Florida Statutes, RA 3. *See Ex Parte Amos*, 112 So. 289 (Fla. 1927).

deed, the second editorial flatly stated that the Governor should remove him from office. (Ex. 5, PC 11)

Petitioner here contends that, notwithstanding the defamatory nature of its publications, under the doctrine of fair comment it is immune from liability.

Summarized with the emphasis as it appeared, the editorials stated:

First Editorial (Pl. Ex. 3, PC 10):

> **"People Have The Right To Know . ... Why does State Attorney Muzzle the Grand Jury?** . . . throwing a road block . . . Is he afraid of something, or of someone? . . . Is he trying to protect someone? . . . the state Attorney has invited both questions . . . His office, however, is not above the Grand Jury's attention . . . people's rights are in jeopardy . . . Brautigam is off the track of his public responsibility . . . We think the judge should have told him so . . . he invites suspicion . . . He can remove it only by reversing his course . . . Brautigam . . . has run out on them . . . Who will speak for the people . . . ?"

Second Editorial (Pl. Ex. 5, PC 11):

> **"Who will represent the Public? . . . State Attorney Brautigam Runs Out On The People . . .** Who will represent the people . . . they have been blocked . . . Brautigam . . . not the servant of the people . . . He ran out on them . . . The . . . Grand Jury Association should get in touch with

> Governor Collins . . . point out that Brautigam turned his back on the people . . . as well as on his job . . . and appoint his replacement."

Examining the editorials in relation to the evidence and utilizing the yardstick advocated by the Herald, (R. 807) the defense of fair comment was not established.

a. The editorials dealt with a matter of public interest and concern.

This we concede, and at the request of respondent the jury was so charged (R. 839, RA 7-8).

b. The editorials were not based on facts truly stated.

It was adjudicated that when Brautigam moved to suppress the illegal portions of the Grand Jury Report he did not "run out" or "turn his back" on the people; that he was not "afraid of something or someone;" that he was not illegally "protecting someone" (or that he was guilty of malfeasance, misfeasance or neglect of duty and subject to replacement).

The Herald well knew prior to the time it published the first editorial that Brautigam was not involved in the report (R. 224 et seq., 475 et seq., 805 et seq., 832). But however, instead of publishing that fact as Doyle admitted had written it (R. 832-833), the Herald (R. 874, 876-880) deleted that material item and inserted its own "code key" (Ex. 2) thereby suppressing a legitimate fact so that its front page news would be consistent with its editorial policy. The Herald also failed to report that

Brautigam had moved to suppress only that portion of the Interim Report which he considered illegal (Ex. 1, Par. 4); it also failed to report that his motion stated that if the subjects of the report had violated any law that they should have been indicted (Ex. 1, Par. 6).

That the editors of the Herald appreciated that a question can be so framed as to indicate a fact was brought to the attention of the jury.[10] (R. 429)

c) All the Statements of which the Plaintiff Complains were Not Expressions of Opinion.

No person reading the editorials could conclude other than that it had been dramatically uncovered that Brautigam was a corrupt public official who had violated his oath of office and that the Governor should remove him (Ex. 5, PC 11); that he should be avoided by decent people; forever barred from a position of public trust. The editorials are classic examples of libel per se. No ordinary person would be likely to understand the editorials as a mere expression of the writer's opinion as contrasted with a direct statement of existing facts. The sting of the libel—the lingering thought, the aftermath, is that Brautigam had been unfaithful to his office.

Editor Pennekamp admitted that "Who is he trying to protect" is a statement of fact. (R. 570) The word "protect" when used of a prosecutor is understood by everyone to imply bribery and corruption in office.

[10] "Mr. Knight: What will I do when the questions are loaded?
The Court: You may ponder them before you answer them."
See Burnham v. Hornaday, 130 Misc. 207, 223 N.Y.S. 750 (1927).

d) The Editorials Imputed Corrupt or Dishonorable Motives To The Plaintiff.

Defendant's contention that the editorials failed "to show any imputation of corrupt or dishonorable motives on the part of the plaintiff" (PC 27) does not warrant reply. The editorials speak for themselves. (Exs. 3, 5).

e) The Editorials Did Not Represent the Honest Expressions of the Editor's Opinion.

At the time Editor Pennekamp drafted the editorials it was not his honest opinion that George A. Brautigam was a corrupt public official who had committed an act which subjected him to criminal prosecution or removal from office.[17] In his judgment, "George Brautigam was a man of honesty and integrity" (R. 612) and if he had reversed himself, he implied he would have been endorsed for re-election. (R. 565) Feeling Brautigam had used bad judgment, (R. 549) the editor never intended to infer that he had any sinister or ulterior motives. (R. 550)

Without compunction, Pennekamp admitted that the editorials were written with the singular purpose of influencing Brautigam in his official duties (R. 599, 601, 613, 620): "I had hoped they would bring George back on the right track, the team he had deserted, but they didn't so there was no effect."[18]

Knowing the contents of the report and that Brauti-

[17] See Section 925.01 Fla. Stat. 1955 (RA 3), Constitution of Florida, Section 15, Article IV (RA 1-2).

[18] *Cf.* This admission with Editor Pennekamp's sworn answer in Pennekamp v. Florida that his "purpose was not to influence the Court" 328 U.S. 331 (347).

gam was not involved; (R. 543, 566) having concluded that former friend, Judge Holt should step down from the Bench—voluntarily or otherwise; (R. 581, 582, 584, 586-588, 606, 607, 608, 609, 610) knowing Brautigam to be an honest public official who at worse had used bad judgment; (R. 549, 550, 603) and wanting the report to be made public regardless—legal or illegal, (R. 575-576) can it be seriously argued that the editorials were an honest expression of Editor Pennekamp's opinion?

3. **The jury finding of actual malice vitiated the defense of fair comment.**

"Privilege is never an effective cloak for malice."[1] The Herald concedes that actual malice defeats the defense of fair comment. (PC 23) In opening statement the jury was informed that Brautigam would prove that the ill will—actual malice—of the Herald towards him was actuated because he stood in the way of other plans of the newspaper. (R. 162-164) Able defense counsel immediately challenged plaintiff's theory. (R 175) In closing argument he kept the issue crystal clear (R. 783, 806):

> ". . . . I will reaffirm what I told you the day I stood before you when we started this case. And I will reaffirm it to you just as steadfastly as I know how. And that is, if you believe that The Miami Herald newspaper was willing to crucify the plaintiff to get to Judge Holt, then I deserve to lose."

[1] Caldwell v. Crowell-Collier Pub. Co., 161 F.2d 333 (5th Cir. 1947).

> "If you think the Miami Herald had it in for George Brautigam, or if you think that they were perfectly willing to do the most unethical thing that anybody could do, to crucify an innocent man to get to a judge, that is what you have to find if you are going to bring in any punitive damages in this case; and then you are going to punish the Miami Herald. That is the idea, punish them.'"

For the jury's consideration Brautigam adduced overwhelming evidence of actual malice:

The editorials per se were a scathing denunciation of Brautigam and the effects therefrom followed him into his private life. (R. 641, 687, 695, 700, 710, 720) The excessiveness of the language is evident. They bristle with malice.

The editors admitted having published two falsehoods concerning Brautigam. On several occasions he requested retractions. (R. 356 et seq. 364-5, 569) The Herald not only refused to retract, but failed to correct acknowledged falsehoods. (R. 137, 440). In the light of the Supreme Court opinion[3] the Miami News apologized to Brautigam (Ex. 13); the Herald criticized the decision. (Ex. 12) Section 770.02, Florida Statute (1955) (RA 3) gives a newspaper opportunity to escape punitive damages by publishing a full and fair retraction. The Herald elected to remain adamant and let a jury determine the issue of

[3] State ex rel Brautigam, 93 So.2d 90 (1957).

actual malice. Failure to retract has consistently been ruled evidence of actual malice.[21]

The repetitious defamations, accusatory headlines and captions, deletions of exculpatory news and other facts heretofore related were evidence of actual malice. The jury, believing the evidence, found that the Herald had willingly crucified Brautigam to get Judge Holt. Taking its counsel at his word, the jury punished the Miami Herald.

4. The Petitioner's rights as guaranteed by the First and Fourteenth Amendments to the United States Constitution were not violated.

(a) The admission into evidence of the judicial opinion. (Interim Report Opinion)

Petitioner cites the four (4) Grand Jury cases[22] to support its contention that the Florida Supreme Court without warning abruptly reversed itself and declared a "new and different rule of law in regard to Grand Jury reports.[23] (PC 26) We submit that such an issue is beyond the scope of the review.[24]

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[21]Metropolis Co. v. Croasdell, 145 Fla. 456, 199 So. 568 (1941); Ross v. Gore, 48 So.2d 412 (Fla. 1950); and Miami Herald Publishing Co. v. Brown, 66 So.2d 679 (Fla. 1953).

[22]In Re Report of Grand Jury, 152 Fla. 154, 11 So.2d 316; Owens v. State, Fla. 59 So.2d 254; Ryon v. Shaw, Fla. 77 So. 2d 455; State ex rel Brautigam v. Interim Report of Grand Jury, 93 So.2d 99 Fla. (1957).

[23]It is noted that in Appellant's Brief below (AB 43) in commenting on the same point, the Herald stated that the Florida Supreme Court "merely clarified and distinguished early precedent".

[24]Long before the interim Grand Jury report, the Florida Supreme Court had made clear pronouncements on the subject, and did not, as the Herald suggests, conveniently or unpredictedly change the law to protect a fellow Judge.

In Florida it is held that the test of admissibility is relevancy; the test of inadmissibility is lack of relevency.[25] In admitting **State ex rel Brautigam**[26] the trial judge *inter alia*, stated, "the court rules that it is relevant." (R. 235-236)

Petitioner speciously contends that since the law concerning Grand Jury reports was different at the time of the editorials than at the time of the trial, it was error for the jury to hear evidence proving that Brautigam legally moved to suppress the report. Such a contention is *reductio ad absurdum*. The issue petitioner fails to grasp is that regardless of the law concerning Grand Jury reports, the editorials were libelous per se as of the day they were written. Brautigam was defamed as of the day they were published — not at the time the court rendered the Interim Report decision. If Brautigam had never appealed the ruling of the assignment judge, he had been no less defamed. If Judge Floyd had been affirmed, the editorials were no less defamatory. The admission of the opinion did not prove the defamation. The editorials proved that. The opinion refuted the defense of justification. Truth and fair comment are not dependent upon the law respecting Grand Jury reports.

Petitioner has been less than candid. Although never assigned as error, (R. 858-859) it now complains of the refusal of the trial court to accept the illegal and expunged Grand Jury report into evidence. Petitioner fails to make reference to its introduction into evidence of i) the **Graves** opinion, (Ex. B) ii) Brautigam's Motion to Suppress, (Ex. C) iii) Judge Floyd's instructions to the Grand Jury,

[25] Williams v. State, 110 So.2d 654, 660 (Fla. 1959).
[26] 93 So.2d 99 (Fla. 1957).

(Ex. J, R. 293-4) iv) the Petition and Order appointing Weissbuch, (Ex. I) or v) the reading of the **Ryon** opinion to the jury. (R. 803) The **Graves** opinion and Brautigam's Motion were placed in juxtaposition before the jury and Brautigam was exhaustively cross-examined on a comparative analysis. The introduction into evidence of these decisions and legal documents evidence and corroborate an undeniable fact — the most important issues in controversy during the trial involved questions of fact concerning legal propositions. Considering that the editorials concerned legal propositions, it is not startling that the trial involved those very same issues, or that Brautigam should attempt to justify his legal position by citing law on that subject from the highest state tribunal.

Thus it can be seen that the opinion was an integral and necessary part of the trial: (1) It was relevant to refute the defense of justification. As a matter of law and of fact the high court held that Brautigam had the legal right to move to suppress the Report and had not been unfaithful to his office. (2) It corroborated the contention of Brautigam (a) that the Report was illegal and should not have been published; (b) that if the Report were true, the persons should have been indicted. (3) It proved the falsity of the headline, "High Court Upset Case Brautigam Cited" (Ex. 4). (4) It proved the falsity of the charge that Brautigam had relied upon a dissenting opinion (Ex. 5). (5) It was evidence that Brautigam had not "protected" anyone. (6) It evidenced malice. It reflected the obdurate attitude of the Herald and its wantonness in refusing to retract in the light of the opinion rendered

weeks before suit was filed. (7) It was the final chapter in the history of the controversial report."

(b) **The court correctly charged the jury that if the editorials were not free from imputation of dishonorable or corrupt motives, the defendant exceeded the bounds of fair comment, without further charging the jury as to the right to make such imputation when reasonably inferred from the facts truly stated.**

Lifting from context a few lines from the court's instructions on defamation, petitioner argues that the jury was instructed "that the one who imputes improper motives to a public official is absolutely liable (PC 27). Respondent denies the accuracy of that allegation. Without further comment, reference is made to the trial court's instructions on defamation, incorporated *in toto* in the Appendix herein (RA 4-18) so that they may reviewed from their four corners.

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[26] In *Chaplinsky v. New Hampshire*, 315 U.S. 567, 574, the Court stated:

> "The refusal of the state court to admit evidence of provocation and evidence bearing on the truth or falsity of the utterances is open to no Constitutional objection. Whether the facts sought to be proved by such evidence constitute a defense to the charge or may be shown in mitigation are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied does not contravene the Fourteenth Amendment."

Mr. Justice Harlan, concurring in part and dissenting in part, in *Smith v. California*, 361 U.S. 147, 172, stated:

> "I know of no case where this Court, on Constitutional grounds, has required a State to sanction a particular mode of proof."

The trial court instructed the jury in regard to the law of defamation, liberally paraphrasing Federal Judge Simpson's instructions in **Curtis Pub. Co. v. Fraser**, 209 Fed. 2d 1, 5th Cir. Fla. (1954). That case was reversed mainly because Judge Simpson instructed the jury that the burden on the issue of malice in connection with fair comment was upon the defendant publisher. Judge Herin did not make the same mistake and petitioner does not contend that he did. Judge Simpson's instructions can be found in Volume II, Transcript of Record, U. S. Court of Appeals, 5th District, #14279, **Curtis Pub. Co. v. Walter B. Fraser, supra.**

Florida, along with the majority of jurisdictions, has refused to extend to the press the privilege (immunity) to publish to the world false statements of fact or imputations of corrupt motives concerning public officials, if such false statements or imputations are the honest belief of the published and are warranted by the facts truly stated.

As far back as the Reconstruction era, the Florida Supreme Court in **Jones, Varnum & Co. v. Townsend's Administratrix**,[27] one of the cornerstones of the American law of defamation, cited by this Court in **Near v. Minnesota**,[28] set forth the permissible limits of fair criticism of a public officer:

> " . . . The official acts of a public functionary may oe fully criticized . . . but the occasion will not of itself excuse an attack upon the character and motive of the officer; to excuse

[27] 21 Fla. 431, 452 (1885).
[28] 283 U.S. 697, 719 (1931).

> this the critic must show the truth of what he has uttered. To accuse one holding a public office of an offense is not privileged, and if the charge be false the utterer is liable, however good his motives, . . . "

The Florida Supreme Court has never deviated from that decision.[29] In **State ex rel Arnold v. Chase,**[30] the Court emphatically reaffirmed the legal limits of fair comment:

> "The comment or criticism must be fair and free of malice. * * * The privilege does not embrace the right to make false statements of fact, to attack the private character of public men or falsely to impute to them a want of loyalty or misconduct in office * * *"[31]

It is to be noted that generally imputations of corrupt motives are classified as statements of fact,[32] on the rationale that "the state of a man's mind is as much a fact as the state of his digestion.[33]

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[29]Montgomery v. Knox, 23 Fla. 595, 3 So. 211 (1881); Jones v. Greeley, 25 Fla. 629, 6 So. 448 (189); McClellan v. L'Engle, 74 Fla. 581, 77 So. 270 (1917).

[30]114 So. 857 (Fla. 1927).

[31]For cases of similar import see McCtarty v. Post Pub. Co., 109 Fla. 93, 147 So. 259 (1933); Metropolis Co. v. Croasdell, 145 Fla. 456, 199 So. 568 (1941); Richard v. Gray, 62 So.2d 597 (Fla. 1953); Walsh v. Miami Herald, 80 So.2d 669 (Fla. 1955).

[32]Negli v. Farrow, 60 Md. 158, 45 Am.Rep. 715 (1883); Sherman v. International Pub. Co. 214 App.Div. 437, 212 N.Y.Supp. 478 (1st Dept. (1925)); Streeter v. Emmons County Farmers Press, 57 N.D. 438, 222 S.W. 455 (1928); Belo & Co. v. Looney 112 Tex. 760, 346 S.W. 777 (1922); Kinsley v. Herald, 113 Vt. 272, 34 A.2d 99 (1943).

[33]Eddington v. Fitzmaurice, 29 Ch.Div. 459, 483 (1882).

The great weight of American authority is to the effect that false statements of fact concerning a public officer, or the imputation to him of corrupt motives is not privileged as fair comment.[14] Florida subscribes to that majority view.[15]

In the instant decision the Third District Court of Appeal reaffirmed Florida's historical alignment with the majority: (PA 13a)

> "The great majority of American courts hold that no comment can be fair if it is based on misstatements of fact. See Noel, 'Defamation of Public Officers and Candidates,' 49 Colum.L.Rev. 875, 896. We concur in this view and align ourselves with the majority.
>
> The appellant urges that we reverse the trial court and adopt a rule by which corrupt or dishonorable motives may be imputed to others *where such imputations are warranted by the facts*. Such a construction of the defense of fair comment has been accepted in England and a minority of American courts. See Gatley, Libel and Slander, 4th Ed., p. 329, and Foley v. Press Pub. Co., 1929, 226 App. Div. 535, 235 N.Y.S. 340. Cf. Rathkopf v. Walker, 190 Misc. 168, 73 N.Y.S. 2d 111 and 274 App.Div. 1064, 85 N.Y.S. 2d. 351.

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[14] A. H. Belo & Co. v. Looney, 12 Tex. 760, 246 S.W. 762, 783. See also Prosser, Torts, 662 (2 ed. 1955); Bover, Fair Comment, 15 Ohio St. L.J. 280, 290 (1954); Newell, Libel & Slander, 4th Ed., Comment, 62 Harv.L.J. Rev. 1207, 1209 (1949); Noel, Defamation of Public Officers, 49 Colum. L. Rev. 875, 881 (1949); Comment, 12 U. of M. L.Rev. 89 (1957); 110 ALR 412; 150 ALR 358.

[15] 110 ALR 412, 150 ALR 358, 359, Doctrine of Privilege or Fair Comment as applicable to misstatement of fact in Publication (or oral communication relating to public officer or candidate for office).

It is our opinion that the better view supports the holding that the defense does not embrace the right to falsely impute one's motives, want of loyalty or misconduct in office. See State ex rel. Arnold v. Chase, supra; Jones v. Townsend's Administratrix, supra; and McClellan v. L'Engle, 74 Fla. 581, 77 So. 270." (Emphasis by the Court) To excuse such an attack, the critic must show the truth of what he has uttered."

Space does not permit quotations from the two leading cases favoring the majority rule written by two famous jurists. See Holmes, J., in **Burt v. Advertiser Newspaper Co.**[47] and Taft, J., in **Post Pub. Co. v. Hallam.**[48]

5. Libelous utterances are not within the area of constitutionally protected speech.

The right of free speech is an American concept without dissent. From the beginning it was limited by state laws.[48] Urging a "uniform law of defamation" by judicial fiat, petitioner would have this Court reverse its historical position and render an opinion as revolutionary as **Erie R. R. v. Tompkins**[49]. Petitioner suggests no sound reason why this Court should reverse the long established

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[47]154 Mass. 238, 242, 28 N.E. 1 (1891).

[48]59 Fed. 530, 540 (C.C.A. 6th 1893).

[48]Thomas Jefferson's first draft of the 1776 Virginia Constitution bears witness to painstaking care taken to assure each citizen redress in the Courts of Virginia for injury caused by abuse of the press. (Papers of Thomas Jefferson, Vol. I, 344, (Princeton 1951));

"Printing presses shall be free, except (*so far as they or their managers shall be subject themselves to the private action of any individual*) where by commission of private injury; they shall give cause of private action."

[49]304 U.S. 64 (1938).

rule that libelous utterances are not within the area of constitutionally protected speech. **Roth v. U. S.,**[50] **Beauharnais v. Illinois,**[51] **Chaplinsky v. New Hampshire,**[52] **Near v. Minnesota.**[53]

If Messrs. Pennekamp and Knight had heeded **Pennekamp v. State of Florida**[54] instead of gloating that they had reversed the Supreme Court of Florida, they would realize that they had been forewarned. This Court unfurled the red flag appropriate to the instant editorials:

> "For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants.."[55][56]

In **Near v. Minnesota,**[57] this Court stated:

> ". . . Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals . . ."

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[50]354 U.S. 476 (1957).
[51]343 U.S. 250 (1951).
[52]315 U.S. 568 (1942).
[53]283 U.S. 697 (1931).
[54]328 U.S. 331 (1946).
[55]*Id.* at 348-349.
[56]It is of academic interest to query whether Mr. Pennekamp and the Herald could have escaped a second contempt if Judge Floyd had determined to make an issue of the second editorial published prior to his ruling.
[57]283 U.S. 697, 719 (1931).

In **Caldwell v. Crowell-Collier Pub. Co.**[6] the Circuit Court of Appeals, interpreting Florida law, stated:

> " . . . Free speech and free press are an established part of our democratic institutions, but both are limited by the law of slander and libel. By word and by pen the official record and pronouncements of a public man may be discussed and criticized, condemned and even vituperated, but the facts cannot be perverted with impunity."

The Herald also invoked Section 13 of the Declaration of Rights, Florida Constitution (RA 1) which provides in part: "every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right."

Section 4 of that same Constitution (RA 1) provides that: "all courts in this state shall be open, so that every person for any injury done him in his . . . reputation shall have remedy, by due course of law."

The instant decision imposed no prior restraint upon the Herald's right to fully speak and write its sentiments on all subjects. The decision merely holds the Herald responsible for the abuse of that right.

SUMMARY

Petitioner was sued for libel by Brautigam for two newspaper editorials directed at his one act of making a motion to suppress a grand jury report; which report

[6] 161 F.2d 333 (5th Cir. 1947).

had not then been accepted and filed, but only tendered for filing. The editorials were published before argument was had on the motion to suppress; before the Court's ruling on the motion and before the report was accepted for filing.

The editorials were false and unfair in point of law and the jury found them false and unfair in point of fact. The law may be uncertain, as petitioner contends, but the principles of truth and fairness are constant.

CONCLUSION

There is an abysmal failure by petitioner to establish even a prima facie basis for certiorari jurisdiction. The jury's finding of actual malice makes moot all subsequent argument concerning legal niceties contained in the defenses to libel. In the absence of absolute privilege, the law affords no defense to a defamation published with actual malice. For the reason and upon the authorities cited herein, we respectfully submit that the Petition for Writ of Certiorari should be denied.

Dated 27 February 1962.

Respectfully submitted,

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APPENDIX

APPENDIX

CONSTITUTION OF THE STATE OF FLORIDA

Declaration of Rights.

SECTION 4. **Courts open to everyone; remedy for wrongs.**—All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay.

SECTION 13. **Freedom of speech and press; truth as defense to libel; etc.**—Every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions and civil actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the matter charged as libellous is true, and was published for good motives, the party shall be acquitted or exonerated.

7

SECTION 15, ART. IV, FLORIDA CONSTITUTION:

SECTION 15. **Removal or suspension of officers.**—All officers that shall have been appointed or elected, and that are not liable to impeachment, may be suspended from office by the Governor for malfeasance, or misfeasance, or neglect of duty in office, for the commission of any felony, or for drunkenness or incompetency, and the

cause of suspension shall be communicated to the officer suspended and to the Senate at its next session. And the Governor, by and with the consent of the Senate, may remove any officer, not liable to impeachment, for any cause above named. Every suspension shall continue until the adjournment of the next session of the Senate, unless the officer suspended shall, upon the recommendation of the Governor, be removed; but the Governor may reinstate the officer so suspended upon satisfactory evidence that the charge or charges against him are untrue. If the Senate shall refuse to remove, or fail to take action before its adjournment, the officer suspended shall resume the duties of the office. The Governor shall have power to fill by appointment any office, the incumbent of which has been suspended. No officer suspended who shall under this section resume the duties of his office, shall suffer any loss of salary or other compensation in consequence of such suspension. The suspension or removal herein authorized shall not relieve the officer from indictment for any misdemeanor in office.

* * * * * *

FLORIDA STATUTES

CHAPTER 770

CIVIL ACTIONS FOR LIBEL

770.01 Notice condition precedent to action or prosecution for libel.—Before any civil action is brought for publication, in a newspaper or periodical, of a libel, the plaintiff shall, at least five days before instituting such action, serve notice in writing on defendant, specifying

the article, and the statements therein, which he alleges to be false and defamatory.

770.02 Correction, apology, or retraction by newspaper.—If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages.

905.49 Duty of prosecuting attorney.—The prosecuting attorney or assistant prosecuting attorney shall attend the grand jurors for the purpose of examining witnesses in their presence, or of giving grand jurors legal advice regarding any matter cognizable by them. He shall also draft indictments.

925.01 Penalty for failure to perform duty required of officer.—Except as otherwise provided herein, any sheriff, constable, justice of the peace, county judge, magistrate, prosecuting attorney, court reporter, stenographer or interpreter, or other officer required to perform any duty as provided in the criminal procedure law who willfully fails, refuses and omits to perform any duty

herein required of such officer to be done and performed, or willfully violates any of the provisions hereof, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five dollars nor more than one hundred dollars for each such offense, or be imprisoned in the county jail not exceeding ten days.

* * * * * *

Circuit Judge William A. Herin's Instructions to the Jury Concerning the Law of Libel.

* * * * * *

T. 836:

Gentlemen of the jury, as you have previously been advised, this is a civil action for defamation in which the plaintiff seeks an award of money damages against the defendant newspaper, The Miami Herald Publishing Company.

The plaintiff alleges that two separate editorials pub-

T. 837:

lished two days apart, as set out in the complaint, are false and defamatory, and were published and circulated by the defendant for the purpose of ruining the plaintiff's reputation.

The plaintiff alleges also that the editorials complained of held him up to public hatred, distrust, contempt and ridicule, and deprived him of public confidence, and

as a result thereby he has suffered embarrassment, humiliation, mental suffering, and injury to his profession.

It is further alleged that the defendant knew of the falsity of the published matter at the time of each publication.

Now, gentlemen, the defendant admits the publication of the two separate editorials and, admits that requests for retraction were made. The defendant denies, however, that the editorials were published maliciously.

The defendant also asserts as affirmative defenses that the statements complained of were fairly accurate and substantially true, and that they were published in good faith and from good motives; and second,

That the editorials were published without actual or express malice, and constituted only fair comment upon matters of public interest.

These two defenses of truth, plus good motive and fair comment, are affirmative defenses as to which the defendant has the burden of proof by a preponderance of the evidence.

T. 838:

For definition of Libel per se, gentlemen, Libel per se may be defined as the false and unprivileged publication by letter, newspaper, or other form of writing, of unfounded statements or charges which expose a person to hatred, distrust, contempt, ridicule, or obloquy, or which tend to cause such person to be avoided, or which have a

tendency to injure such person in his office, occupation, business, or employment, and which are such that in their natural and proximate consequence, will necessarily cause injury to the person concerned, in his personal, social, official, or business relations of life, so that legal injury may be presumed or implied from the bare facts of the publication itself.

Libel per se, gentlemen, means that the words are defamatory on their face and need no further explanation.

The defendant who publishes matters that are defamatory on their face is liable to person defamed unless he can prove by a preponderance of the evidence that the written words are true and published for good motives.

With respect to the defense in which the defendant asserts that the complained of statements contained in the editorials were substantially true, and were published with good motives, the Court charges you that the burden of proving this defense is upon the defendant and to establish this defense the defendant is obliged to prove both elements of the defense. That is to say, that the statements contained in the editorials are substantially true

T. 839:

and published with good motives. To sustain this defense the defendant must show not only that the facts stated in the body of the editorials are substantially true, but they must also show the substantial truth of the headlines as construed with the body of the editorials in the respect complained of by the plaintiff.

In order for a publication to be made for good motives, it must appear that the libelous matter was published without malice, recklessness or wantonness. Libelous matter cannot be said to be published with good motives if the accusation proceeds from ill will or ulterior motives, or an intention to do ulterior and unjustifiable harm, nor if said publication is the result of actual malice.

In respect to each of the editorials complained of, if you find that the facts contained in such statements were not substantially true, or, if substantially true, were not published for good motives, without malice or in reckless disregard of the plaintiff's right, or if such statement is libelous, then this defense has not been sustained, and your finding on such issue must be for the plaintiff.

Gentlemen of the jury, one of the defendant's defenses is that the matter was subject to the privilege of fair comment. The acts of public officials are subject to scrutiny and honest criticism. I charge you, therefore, that the editorials were on matters of public interest and

that such matters were subject to fair comment and criticism. As to the defense of fair comment on matters of public interest, the Court charges you that the defendant, as publisher and circulator of a daily newspaper, has the same or no greater right or privilege to make comment upon or publish criticism of the plaintiff's actions than any individual citizen would have. Any statement which would be libelous, if published by an individual citizen, would be libelous, if published in, and circulated through the medium of such a newspaper. Likewise, any statement

of fact, which would not be libelous, if published by an individual, would not become libelous simply because published in such a newspaper. Sometimes it may happen that a person may be damaged by such criticism on matters of public interest; yet, he would have no right of action, if such criticism was an expression of opinion only, and not a false statement of a material fact, or was free from imputation of a corrupt and dishonorable motive, unless the criticism was made with bad motives and for the malicious purpose of injuring the plaintiff.

Gentlemen of the jury, an author may in good faith, fully express his honest views to the public, even though such views are humorous, satirical, or unfavorable. But the comment must be fair.

A criticism or comment is unfair if it goes further than the occasion or the acts commented upon warrant,

T. 841:

or if it makes unfair exaggeration. The comment is fair only when it confines itself to things or to acts or conduct of persons. Comment going so far as to attack personal character or to impute immoral or corrupt motives is unfair and not privileged. In order to constitute fair comment, it must appear that the language complained of must comment upon factual matters, and not a libelous misstatement of material facts themselves. The defense of fair comment must be the expression of an opinion, but must contain no misstatement of any material fact, and must not be an attack upon the character of the individual concerned, or referred to in the comment. It is an essential ingredient of fair comment that the critic

confine himself to criticism and not make his criticism a veil for personal censure, or allow himself to run into reckless and unfair attacks merely for the purpose of exercising his power of denunciation.

If you find that the language in either or both of the editorials complained of is not free from the imputation of dishonorable or corrupt motives, then I charge you that the defendant has exceeded the bounds of fair comment and you should find for the plaintiff as to the defendant's liability arising from the publication of either or both of the editorials in question.

Gentlemen of the jury, you must consider whether the plain meaning of the words of the editorials published

T. 842:

by the defendant implied that the plaintiff or his office was personally involved in the grand jury report which was sought to be suppressed.

If you find such an implication in the editorials, then you must decide whether the defendant knew, or should have known, at the time of publication that the plaintiff, or his office, was not involved in the grand jury report mentioned in the editorials.

It is necessary for you to decide these questions because the defendant relies on the affirmative defense of fair comment or honest criticism. But comment or criticism is never fair if it is not the honest belief of the writer, no matter how good his motives or intentions are.

Therefore, I charge you that if you find that the defendant knew or should have known at the time of the publication of the editorials that the plaintiff or his office was not personally involved, and that nevertheless the defendant, having such knowledge, implied that the plaintiff or his office was implicated, then you should find that the defendant cannot avail itself of the defense of fair comment, since the editorials were not the honest belief of the writer.

Gentlemen of the jury, if you find that the editorials complained of meet the test of fair comment or honest criticism, as I have specified that defense to you, the defendant will then have carried the burden of proof, proving his affirmative defense.

T. 843:

In such event, the burden will lie upon the plaintiff to have proven to you by a preponderance of the evidence that the defendant published the editorials complained of with actual malice.

I charge you that actual malice would destroy any defense interposed in this case by the defendant, since privilege is never an effective cloak for malice.

Now, we will proceed with some definitions of the term "malice."

Gentlemen of the jury, as you have seen, the question of malice and actual malice are important facts in controversy for you to determine. Therefore, I shall in-

struct you as to their definitions so that you may distinguish between legal malice and actual malice:

By use of the term malice in these instructions, as distinguished from actual malice, I advise you that when a defamatory article is published about an individual the law presumes that said article was maliciously published, and the burden is on the defendant to prove otherwise.

This is so, because every person is presumed by the law to have a good reputation until proven otherwise. Therefore, when an article is written which on its face would tend to destroy a person's presumed good reputa-

T. 844:

tion, the law implies that the article was published with malice. As a matter of fact, this is a mere fiction of the law and is therefore called legal malice.

But it is important that you understand that when the Court speaks of actual malice there is a distinction; and I will now explain to you the meaning of the term "actual" malice.

Gentlemen of the jury, therefore it is important that you fully understand what is meant by actual malice. I charge you that personal animosity and ill will are classic examples of actual malice; however, I admonish you that those are not the only elements which would substantiate the plaintiff's allegation of actual malice.

Actual malice can be determined in other ways. It may be inferred, for example, from the language of the

publication itself, from the failure of the defendant to comply with the necessary request for retraction; from evidence of other defamatory statements published by the defendant about the plaintiff on other occasions; from the evidence of reckless disregard of plaintiff's rights; from the omission of material facts in the articles complained of; from the knowledge of the falsity of imputation of motives where improper motives are unnecessarily imputed; or where there is evidence of improper and unjustifiable motives on the part of the defendant.

Now, express malice, in its legal sense, means a

T. 845:

wrongful act done intentionally or with evil intent, without just cause, or as the result of ill will or personal spite. Malice does not, however, necessarily imply spite against any individual, but, rather, in many instances, may be inferred from a proof of wanton disregard of the rights of others, which is equivalent to an intentional violation of them. Mere carelessness or simple negligence, standing alone, is not sufficient to supply the inference of malice.

If you find that the language used in the alleged libel is intemperate in character, or that the language used is utterly beyond and disproportionate to the fact, or that there was a deliberate omission of material facts, or that false, corrupt motives were unnecessarily imputed to the plaintiff, plus the defendant's failure to retract, you may be warranted in inferring the existence of express malice.

A corporation is responsible for the acts of its offi-

cers and agents, acting within the scope of their authority, and any malice of any such officer or agents, so acting whether resulting from personal ill-will or evidenced by a reckless and wanton disregard of the plaintiff's rights, may be imputed to the corporation. So, if, in this case, you find that any officer or agent of the defendant, acting within the scope of his employment, was motivated by any personal ill-will toward the plaintiff, or acted in reckless disregard of the plaintiff's right, in publishing or circu-

T. 846

lating these editorials, the malice of such officer or agent would be imputed to the defendant by whom he was employed.

If you find from the evidence that the author of the editorials was actuated by actual malice toward the plaintiff, or that he acted in reckless and wanton disregard of the plaintiff's rights, and if you further find, from a consideration of either or both of the editorials, or from any of the other evidence, that the defendant knew, or, in the exercise of reasonable care, should have known of such malice on the part of the author, or such reckless disregard by the author, of the plaintiff's rights, then such malice on the part of the author may be imputed to the defendant.

Gentlemen of the jury, as you have heard, there has been discussion about the admissibility into evidence of publications other than the two editorials being sued upon. Since the issue of actual malice is for you to decide, I have permitted these publications to be considered by you for the sole purpose of helping you to decide whether there

has been malice or lack of malice. As I have permitted the plaintiff to introduce proof of other matter tending to show malice, and in aggravation of damages, since such publications tend to show attitude of the defendant toward the plaintiff, I have likewise permitted the defendant to introduce other publications to show good motive or lack of malice.

T. 847:

I charge you, therefore, that in evaluating these additional publications, and by that, I mean publications or matter other than the two editorials being sued upon, you must consider them for one purpose only, and that one purpose is to decide whether the defendant, when it published the two editorials complained of, Plaintiff's Exhibit 3, and Exhibit 5, as I recall, was actuated by malice, or was actuated by good motives.

You will recall, Gentlemen of the jury, that the plaintiff alleges that on April 28, 1956, and on April 30, 1956, when the plaintiff was the State Attorney of the Eleventh Judicial Circuit, the defendant published editorials in its newspaper, The Miami Herald, concerning the plaintiff; that the editorials were known to be false and were for the purpose of ruining the plaintiff's reputation as a citizen and public official and maliciously exposed him to public hatred, contempt, ridicule and distrust, with the result that he was deprived of public confidence as a citizen and official, and that the publication caused him to suffer embarrassment, humiliation and mental agony; that the defendant was requested to retract any false matter in the editorials but refused to do so.

The defendant admits that the plaintiff was the State Attorney, and admits that it published the editorials set forth in the complaint, and further admits that it refused to retract them, but denies all the other allegations in the complaint. The defendant further avers that it was com-

T: 818:

mon knowledge that the Dade County Grand Jury was investigating the official conduct of public officials; that there was widespread public interest in the investigation and report of the Grand Jury; that the editorials concerned the plaintiff's attempt to have the Grand Jury's report withheld from the public; that the editorials were true insofar as they related to factual matters, and that insofar as they consisted of expressions of opinion, such opinions were fair comments, made in good faith and without malice, and, therefore, were privileged publications. The plaintiff's allegations, which are denied, and the defendant's affirmative allegations constitute the issues which you are to decide, and your duty, therefore, is to determine whether or not the publications were true and published in good faith, or constituted fair comment and thereby were privileged communications.

You are instructed that public officials and candidates for public office submit their acts and conduct to the close scrutiny of the public, and newspapers have not only a right, but a duty to utter publications concerning such matters for the benefit of the voting public.

You are further instructed that newspapers are not liable in damages to persons or public officials, including those seeking election to office, for any injury caused by

editorial comment on their acts and conduct, if the comment is based on facts truly stated, and with good motive,

T. 849:

and the editor's conclusions or inferences are such that a fair-minded man might reasonably draw from the stated facts, and if the comment also constitutes an honest expression of the writer's opinion, and does not impute corrupt or dishonorable motives to said individual.

Now, gentlemen, in the event that your verdict is for the defendant in this case, you would not need to consider the question of the plaintiff's damages. However, if you find for the plaintiff in respect of either or both of the editorials complained of, then you should render a verdict for the plaintiff in such sum as in your sound judgment you find will fairly and fully compensate him for the injury done to his reputation by the tendency of such publication to bring him into disgrace and disrepute, and also on account of its tendency to expose him to public ridicule, disgrace, contempt, or hatred, and distrust, and to injure him in the pursuit of his livelihood.

Gentlemen of the jury, punitive or exemplary damages are awarded not as compensation for a wrong done to a plaintiff, but as punishment for the wrongful conduct of the defendant, as an example tending for the protection of all good citizens from a repetition of similar wrongs.

In addition to claiming actual damages and injury to his good name, credit and reputation, the plaintiff claims punitive or exemplary damages. His claim in this respect is based upon his assertion that the publication and circu-

T. 850:

lation of these editorials by the defendant was prompted and attended by express malice, or by such reckless disregard of the plaintiff's rights as to be equivalent, in law, to express malice. The burden of proof with respect to this issue is upon the plaintiff, and unless you find from the evidence that the plaintiff has established the existence of such express malice or such reckless disregard of the plaintiff's rights as to be equivalent to express malice, then you are not permitted to include any allowance for punitive or exemplary damages in your verdict. If, however, you find from a preponderance of the evidence, that the defendant was guilty of such express malice, or of such reckless disregard of plaintiff's right, then you may include in your verdict an award for punitive or exemplary damages.

Gentlemen of the jury, if you find that the plaintiff is entitled to recover punitive damages, then, in determining the amount of punitive damages to be awarded, you may take into consideration the financial worth of the defendant.

You should also consider the extent of the plaintiff's injury as found by you in your award of compensatory damages.

Questions of the award for punitive or exemplary damages and of the amount to be awarded therefore are both within the sound discretion of the jury, having in mind the purpose of such award and taking into consideration all of the circumstances of the case. The discretion to award punitive damages is not an unbridled dis-

cretion, but a sound one, to be exercised on consideration of what, under the evidence, would be a reasonable and proper verdict. It must be called to your attention that the amount of damages claimed by the plaintiff in his complaint is two million dollars. This allegation is not evidence. It is merely a claim, and must not be considered by you as evidence, but merely as the maximum limit of the plaintiff's recovery in the event you find he is entitled to recover damages from the defendant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 681

THE MIAMI HERALD PUBLISHING CO., a Florida corporation, *Petitioner*,

v.

DOROTHY M. BRAUTIGAM, as Administratrix of the Estate of George A. Brautigam, Deceased, *Respondent*.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

For the sake of brevity, Petitioner's brief in reply to Respondent's brief in opposition to the granting of certiorari will be limited to the questions as to whether this Court has jurisdiction, and if so, whether that jurisdiction ought to be exercised by granting the writ of certiorari prayed for herein. Petitioner deems it unnecessary to reply to Respondent's arguments on the merits.

THIS COURT HAS JURISDICTION TO GRANT CERTIORARI

Respondent objects to the jurisdiction of this Court on the grounds that no substantial federal question is involved, that a federal question was not properly raised in the trial court and that the judgment in question can be sustained on independent grounds of Florida law (Respondent's Brief, pp. 2-6). Petitioner respectfully submits that:

a. A Substantial Federal Question Is Involved

Contrary to Respondent's argument, Petitioner does not and has never contended that libelous utterances are within the area of constitutionally protected free speech. Petitioner does assert, *inter alia*, that the determination under state law of what is a libelous utterance may not conflict with the Federal constitutional guaranties of free speech and free press. Thus, as was stated by this Court in *Beauharnais* v. *Illinois*, 343 U.S. 250, 263-264 (1952):

> "* * * 'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel."

Petitioner raises the further question whether judicial errors in the course of a libel trial, in effect destroying the defense of fair comment, may conflict with those constitutional guarantees under the First and Fourteenth Amendments to the Constitution of the United States. By virtue of the rulings and judgment of the trial court, which were affirmed by the judgment of the highest court of Florida in which a decision could be had, Petitioner asserts that it was effectively deprived of its defense of fair comment

which is protected under the free speech and press guaranties of the First and Fourteenth Amendments. Judge Charles Carroll recognized the presence of a substantial federal question when, in dissenting from the judgment of the District Court of Appeal of Florida, Third District, affirming the judgment entered by the trial court against this Petitioner, he said (Petitioner's Appendix, 5a-35a, at 15a, 17a-18a):

> "At the risk of oversimplification, it may be said that the manner and extent to which the defendant publisher was deprived of the benefit of the defense of fair comment and, therefore, of its constitutionally guaranteed freedom of speech and of the press, was this: Under the law upon which the publisher was entitled to rely when the publications were made, the defendant publisher might or might not have succeeded before a jury on the defense of fair comment, but on the basis on which this case was tried, with the subsequently rendered Interim Report case opinion of the Supreme Court of Florida before the jury, the defense was doomed."

If the right of fair comment is constitutionally protected, then Petitioner has raised substantial federal questions in respect of (A) the extent to which the right to comment on matters of public concern is protected as a matter of Federal constitutional law; and (B) whether the rulings below (Petition for Writ of Certiorari, pages 25-28) effectively deprived Petitioner of its defense of fair comment as a matter of Federal constitutional law.

b. The Federal Question Was Properly Raised and Was Decided by the Court Below

Respondent admits that Petitioner invoked the First Amendment at the outset of the case in its Answer to the Complaint, but asserts that this Court's jurisdiction should not be exercised because the Fourteenth Amendment was not invoked until Petitioner filed its Assignments of Error on appeal to the District Court of Appeal of Florida, Third District.

In the case at bar the First Amendment was invoked in Petitioner's Answer in the trial court and counsel for the parties made repeated references to free speech and press during the course of the trial (R. 150-151, 183, 756-757, 779, 783-784, 805, 808, 818, 821, 823-824). In its Assignments of Error both the First and the Fourteenth Amendments were invoked by Petitioner. The questions in respect of free speech and press were "essentially involved" in the pleadings before the trial court and were squarely presented to the court below on appeal in the Assignments of Error, in Petitioner's brief and in argument. There can be no doubt that the court below considered and decided, adversely to Petitioner, the assertion of the right of free speech and fair comment under the Federal Constitution. The District Court of Appeal stated in its opinion (Petitioner's Appendix, 5a-35a, at 10a-11a):

> "The appellant [Petitioner herein] contends the judgment deprived it of the right of free speech and fair comment guaranteed by the First and Fourteenth Amendments of the United States Constitution, as well as Section XIII of the Declaration of Rights of the Florida Constitution.
>
> * * * *
>
> "* * * The difficulty in construing these constitutional guarantees arises when the right of free expression collides with an individual's right to

> the protection of his good name. These conflicts defy precise analysis. However, it is sufficient for this discussion to say that the rights of free speech and press were designed primarily to prevent interference by the government with a man's speech or writing but not to obviate his responsibility for what has been published."

In dissenting from the majority opinion of the District Court of Appeal, Judge Charles Carroll also recognized that the issues of free speech and free press was before the court, saying (Petitioner's Appendix, 5a-35a, at 34a-35a):

> "That basis on which this case was tried, and the erroneous charge, each operated to strip from the defendant its shield of fair comment, and thereby to withhold from it freedom of speech and of the press, in violation of the First and Fourteenth Amendments to the Constitution of the United States by denying to defendant, due process of law."

It is to be noted that this Court's jurisdiction under 28 U.S.C. Section 1257 is to review the final judgments or decrees of "the highest court of a State in which a decision could be had". In this case, the Supreme Court of Florida held that it was without jurisdiction to review on direct appeal from the trial court and, after the District Court of Appeal had entered its decision on the merits, the Supreme Court of Florida refused to grant review by certiorari (Petitioner's Appendix, 2a-5a, 35a, 36a). Thus, the highest court of the State of Florida in which a decision could be had was the District Court of Appeal, Third District. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954). It is the judgment of that court which is properly brought here for review. Significantly, Respondent has not challenged Petitioner's position.

In *Raley* v. *Ohio*, 360 U.S. 423 (1959) this Court dismissed the appeals there pending but granted review by writ of certiorari. Asserting its jurisdiction under 28 U.S.C. Section 1257 (3) to review by writ of certiorari, the Court said, at pages 436-437:

> "* * * There can be no question as to the proper presentation of a federal claim where the highest state court [Supreme Court of Ohio] passes on it. See Manhattan L. Ins. Co. v. Cohen, 234 US 124, 134, 58 L ed 1245, 1253, 34 S Ct 874. We think this sufficient here to satisfy the statutory requirement that the federal right sought to be vindicated in this Court be one claimed below; 28 USC § 1257 (3)."

In *Manhattan Life Insurance Co. v. Cohen*, 234 U.S. 123, at page 134 (1914), cited in the *Raley* case, *supra*, this Court refused jurisdiction but it set forth the rationale supporting jurisdiction as follows:

> "* * * where the record leaves no doubt that rights * * * [required to be expressly set up and claimed in the court below] were *essentially involved* and were necessarily passed upon, there would be jurisdiction to review even although such rights had not been expressly asserted below (see Tilt v. Kelsey, 207 U.S. 43, 51, 52, L. ed. 95, 99, 22 Sup. Ct. Rep. 1); the right to review under such condition being in effect but a result of the elementary rule that *it is irrelevant to inquire how and when a Federal question was raised in a court below where it appears that such question was actually considered and decided.*" (Emphasis supplied)

As a consequence of the foregoing, Petitioner respectfully submits that the federal question here presented was properly raised and was decided by the highest court of Florida in which a decision could be

had within the meaning of the requirements set forth in 28 U.S.C. Section 1257 (3).

c. The Judgment Below Cannot Be Sustained on Independent Grounds of Florida Law

At page 6 of its Brief, Respondent contends in substance that since fair comment is no defense to a libel published with actual malice, the judgment in question can be sustained on independent grounds of Florida law. Petitioner deems it improper to argue the merits on the question of actual malice, and refrains from doing so, other than to note that throughout the trial Respondent disclaimed the existence of "personal animosity", "ill-will", "hatred", or "ill-feeling" toward him on the part of Petitioner or its employees (R. 164, 302-308, 362-363, 544, 751, 829); and, although Respondent has relied upon the theory that Petitioner bore actual malice toward him because of its desire to secure the removal of Dade County Circuit Judge George E. Holt, not a shred of evidence was adduced in support of that contention (See Respondent's Brief, pages 20-21; Petition for Writ of Certiorari, pages 15, 23).

Respondent misapprehends the effect of the decision below. As recognized in both the majority and dissenting opinions of the District Court of Appeal, Third District, the judgment rests squarely upon its resolution of the question whether or not Petitioner was deprived of its constitutionally protected rights under the First and Fourteenth Amendments. Accordingly, the holding by the court below that the evidence (including that in respect of actual malice) was sufficient to support the judgment was inextricably interwoven with the constitutional questions presented by the Petition herein.

THIS COURT SHOULD EXERCISE ITS JURISDICTION AND GRANT CERTIORARI

The questions raised by this petition for a writ of certiorari are of vital consequence to every citizen, including newspapers, who would publicly take issue with and criticize those who govern or represent them. Implicit in the questions here presented is the proposition that the rights guaranteed by the First and Fourteenth Amendments to the Constitution are not exhausted by exercising the mere right to make the utterance. It is respectfully submitted that the shield afforded by those Amendments also protects the right to a fair trial on the defense of fair comment under the rules of law in effect at the time the utterance was published.

CONCLUSION

For the reasons herein advanced, and for those set forth in the Petition, it is respectfully submitted that this Court should, and properly may, exercise its jurisdiction by issuing a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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